

**UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

IN THE MATTER OF THE COASTAL }
CONSISTENCY APPEAL OF THE }
ISLANDER EAST PIPELINE COMPANY }

OCTOBER 6, 2003

**OPENING BRIEF OF THE STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

INTRODUCTORY STATEMENT:

The State of Connecticut Department of Environmental Protection's (hereinafter "DEP") objection to Islander East Pipeline Company, LLC's request for a Coastal Zone Management Act ("CZMA") coastal consistency certification for a gas transmission route across one of the most ecologically sensitive reaches of Long Island Sound exemplifies how high the stakes are in the struggle to preserve and protect natural resources from unnecessary and damaging development. The DEP's action responds to the company's inadequate scoping of its proposed project as well as to the adverse environmental consequences of driving a pipeline route through the state's Thimble Islands, one of the most, if not the most, ecologically and geologically unique reaches of the Connecticut coast. This is a small but concentrated shoreline area that exhibits great habitat diversity due to its geological morphology, and which is commercially vital to the future of Connecticut's shellfish industry, but it is only a portion of a very precious resource, the Sound itself. This estuary, Connecticut's only coastal water body, provides such a rich assortment of

natural resources—fish, shellfish and waterfowl to name but some of its treasures—and such an immediacy of access, that only proper management and conservation can save it.

The DEP's objection is an environmental assessment of the adverse consequences of siting and constructing Islander East's proposed project. The agency's action is *not* and never was a determination that new supplies of natural gas are undesirable either for Connecticut or any other state in the region, and the DEP has *never* taken the position that there is *no* place for proposals like Islander East's. The State of Connecticut does, however, on the basis of objective review of the applicable standards and criteria, object to the certification of projects that will degrade and endanger key environmental and economic resources of the state, and where less damaging alternative configurations of the basic proposal to increase energy supplies are available. The state is under an obligation cast upon it by the federal government through the CZMA to apply to such proposals the enforceable coastal management policies of the state. Unfortunately, Islander East has ignored them. These review requirements are just as important to the future of the people as the utility infrastructure determinations that energy regulatory authorities like the Federal Energy Regulatory Commission have made. The State of Connecticut cannot abdicate its public trust responsibility to preserve natural resources that heretofore have not been significantly impacted by development. It must strive to minimize adverse impacts upon those resources. All of this is required by the coastal review process.

Islander East's proposal is in no way a unique project, nor does it offer any unique opportunity to improve the overall scheme of natural gas delivery to this region. There are several pipeline projects in various stages of development besides that of Islander East, some under the consideration of the State of New York, which would also supply natural gas to many

of the same market areas. The natural gas supply infrastructure has not neglected Long Island. The balance of interest to irreversible harm to coastal resources must tip in favor of restraint, revision and relocation, because ecological harm is lasting, and sometimes permanent. Only another route for Islander East's project will satisfy that concern and the State of Connecticut stands ready, in an informed and open process under its coastal management program, to assist in the task of determining the suitability of project proposals that must inevitably have an impact upon such a significant resource as Long Island Sound. The state has, in fact, previously permitted the crossing of the Sound by utilities, thereby manifesting its understanding of the balance of use and conservation that is inherent in the field of coastal resource management.

The Secretary should dismiss the instant request for an override of the DEP's objection. There is no substantive ground under the CZMA and applicable federal regulations upon which Islander East's request could be granted. Under Ground I, Islander East must demonstrate that its project significantly and substantially advances the national interest. It fails to do so. The company also must demonstrate that any national interest shown is not outweighed by the adverse environmental impacts associated with it. Islander East clearly fails to make that showing. Finally, the state having identified an alternative to the proposal, Islander East must show that the alternative specified is neither available nor reasonable. The company cannot sustain its burden under this element. Alternatively, under Ground II, whether the project is "necessary in the interests of national security," Islander East has failed utterly to prove that the national security interests of the United States would be impaired.

FACTUAL SYNOPSIS:

On October 15, 2002, the DEP issued an objection to Islander East's request for coastal consistency certification. *Attachments, Item No. 1.* In accordance with the applicable provisions of the federal Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*, and the act's implementing regulations, 15 C.F.R. § 930 (2000), the DEP concluded that Islander East's proposal was not consistent with the enforceable policies of Connecticut's federally approved Coastal Zone Management Program ("CZMP"). The project, as proposed, was deemed likely to cause significant adverse environmental impacts on coastal resources, engendering a degradation of water quality, the destruction and permanent alteration of essential shellfish habitat, and adverse impacts upon tidal wetlands. The DEP further concluded that Islander East's gas transmission pipeline proposal was not a coastal water dependent use, but would displace established water-dependent uses. *See* 15 C.F.R. § 930.63.

On November 14, 2002, Islander East filed a request with the Secretary of Commerce ("Secretary") for an administrative override of the DEP decision. In accordance with the regulations governing the instant appeal and request for override, Islander East thereafter filed a request for remand, in order that the DEP consider alleged substantial new evidence bearing upon the underlying request for coastal consistency. 15 C.F.R. § 930.129(d). The Secretary, acting through the National Oceanic and Atmospheric Administration ("NOAA") Office of General Counsel, remanded the issue of coastal consistency to the DEP on June 2, 2003. The DEP reviewed the information contained in March, 2003, correspondence from Messrs. Muhlherr and Reinneman of the company, and the agency responded on July 29, 2003, affirming its prior objection to Islander East's request for coastal consistency. *Attachments, Item No. 2.*

The DEP's July 29, 2003, affirmance of its original coastal consistency certification objection specifically concluded that, while Islander East's "new information" made some effort to reduce adverse environmental impacts by revising certain construction methodologies, the project proposal was not approvable and, furthermore, that the current proposal's feasibility was dependent upon a serious investigation of alternative routes concerning which Islander East had failed to provide. The DEP summarized its position on the Islander East application in the following manner:

The proposed pipeline's siting through one of the most unique, productive and diverse habitat complexes along the Connecticut shore would have significant adverse impacts that are *inconsistent with the CZMP*. *While pipeline construction is not inherently inconsistent with the CZMP, the siting of it in this location is*. In sum, the Department has charged with ensuring that only that alternative with the least environmental impact is utilized. In the interest of protecting sensitive coastal resources and finding any project consistent with the CZMP, *the only acceptable alternative must combine both the least invasive construction techniques with the most appropriate siting of the facility*.

Letter from Arthur J. Rocque, Jr., Commissioner of Environmental Protection, State of Connecticut, to Gene H. Muhlherr, Jr., Islander East Pipeline Co., LLC ("DEP Consistency Objection") (July 29, 2003) at 9 (emphasis added). The DEP nevertheless made note of a specific feasible and available alternative, the ELI System Alternative, remarking that this alternative compared more favorably with the state's federally-approved coastal zone management plan. Finally, with respect to the issue of alternatives, the July 29, 2003 objection of the DEP concluded that there were other alternative locations that could meet Connecticut's coastal zone management consistency criteria were the data developed by Islander East.

PRELIMINARY POINTS

Islander East's proposed project is fraught with highly problematic environmental review issues. Entwined with this review are certain background considerations involving not only Islander East's licensure proceedings before the Federal Energy Regulatory Commission, but also how those proceedings relate to co-ordinate proceedings under the CZMA. To this must be added the claims that Islander East has advanced respecting the economic factors that purportedly demonstrate need for its proposed project. Finally, because the DEP has issued a tentative determination to deny Islander East's request for water quality certification, the Secretary should be aware of their impact upon the instant review proceedings.

1. The Islander East Project Proposal Involves Major Impacts To Coastal Resources Of The State Of Connecticut

Islander East proposes to lay down an approximately 50-mile long interstate natural gas pipeline in order to add another linkage between the Connecticut and Long Island, New York markets in addition to those already in place. As represented by the company, the project will transmit 260,000 dekatherms per day (Dth/d) of natural gas to Long Island, an amount estimated to be able to heat more than one-half million residences. The work required in order to bring this project to fruition includes trenching pipe through conservation areas (the Branford Land Trust); trenching and filling of portions of over thirty (30) acres of wetlands; trenching or blasting through contaminated bedrock in the vicinity of private drinking water supplies; and the use of horizontal directional drilling ("HDD") in order to bring the pipeline from the coast to a point some four thousand feet from shore and out an exit hole on the bottom of Long Island Sound;

and, thence, by trenching and plowing over approximately twenty-two miles through the bottom sediments of the Sound to landfall on the New York side.

The HDD technology is proposed for the nearshore waters as an alternative to straightforward but immensely destructive trenching by conventional dredging techniques. Unlike conventional uses of this technology to bypass an obstacle (a river, for example) by completely burrowing beneath it and up and out beyond it, Islander East's proposal will simply break out into the bottom of the Sound in nearshore waters. HDD utilizes "drilling mud" or bentonite "drilling fluid", a mixture of water and bentonite. The Connecticut Siting Council¹ ("CSC") found² that approximately 19,100 gallons of drilling fluid would be released into Long Island Sound attendant to creation of a pilot hole, and another 218,000 gallons would be released during the "pipe pullback operation." The HDD operation would release approximately 7.4 million gallons of drilling fluid (~1,192 cubic yards of bentonite unmixed) into the Sound near the proposed exit hole during the reaming operations and swab pass, and this figure assumes an inability to recover forty (40%) percent of the drilling fluid from the environment. The material, which will accumulate in the drill bit break-out exit pit (a bottom excavation of dimensions approximately 250 by 300 by 20 feet, revised to dimensions 130 by 310 by 18 feet) is susceptible to carry by currents, and, having gelled or consolidated in the presence of seawater, has the ability to smother benthic organisms wherever it settles upon existing sediments. The Siting

A governmental body that makes findings regarding facilities, energy transport and transmission systems. Conn. Gen. Stat. § 16-50p(c)(2).

² Islander East has characterized the outcome of the CSC's proceedings as an "approval." I.E. Bf. at 25. The CSC corresponded with Islander East on May 29, 2003, pointing out that its proceedings did not

Council also found that unplanned releases could occur along the HDD segment depending upon the geology, depth and diameter of the bore hole and the pressure and consistency of the drilling fluid (so-called “frac-outs”).³ CSC Findings Nos. 93-95. The company did not have a scoped alternative to deal with the prospect of the drilling’s failure, and the prospects are indescribably damaging: excavation or dredging of a channel through all of the nearshore waters, including access dredging for work barges. *See* DEP Consistency Objection (July 29, 2003) at 11. The HDD and plowing aspects of the proposed project will affect more than 3,000 acres of underwater habitat. The amount of sediment disturbance associated with the project is very great: approximately 44,700 cubic yards attributable to the dredging phase; and another 504,400 cubic yards attributable to the plowing across the Sound until the Long Island shoreline is reached.

Most alarmingly, Islander East’s preferred alignment calls for the HDD technology and trenching activity to be employed in an area that runs through the Thimble Island complex, a pristine, highly diverse habitat and geologically unique area located off Branford, Connecticut, described by one expert in the proceedings below in the following terms:

It’s probably one of the most variable and unique [ecological systems] I think along the coast of Connecticut as everyone knows that from a tourist sense and from an aesthetic sense, but it gives you—if you’re looking at diversity as one of the biological axioms of healthy environment, the Thimble Islands has soft mud bottoms, oyster reefs, it

“approve” the company’s application, and that it found use of the term “potentially misleading.” *Attachments, Item No.3.*

³ DEP’s finding in its coastal consistency objection was that its experience with HDD indicated that reported frac-outs occurred in approximately fifty percent of the projects. Frac-outs occur most commonly when drilling transitions from one geological substrate type and enters another (*e.g.* from rock to sand), a scenario that will be played out in the Islander East proposed project. DEP Consistency Objection (July 29, 2003) at 5.

has rocky outcrops, it has numerous shelters from any wind, a tremendous fish habitat. So this is smack-dab in the middle of one of the most highly valuable, multiple marine ecological environments there is on the coast of Connecticut.

Testimony of Dr. L. Stewart before the CSC, April 12, 2002, at 235-36. *Attachments, Item No. 4 (CSC Hearings, April, 2002)*. Echoing these observations were those of the community of commercial shell fishermen, people who are intimately familiar with the resources of Long Island Sound and of particular habitat areas like the Thimble Islands. Lawrence Williams testified before the Connecticut Siting Council that this reach of the Sound “has been, first of all, from an historical standpoint, the Thimble Island area has been essential for an oyster fishery for over a hundred years. That’s fairly well documented.⁴ There are a great many oyster beds in the immediate area that have been very important to the shellfish industry for quite some time . . .” CSC Testimony of L. Williams (April 17, 2002) at 85. *Attachments, Item No. 4 (CSC Hearings, April, 2002)*. Islander East’s proposed project would trench and scarify the bottom across this area and negatively affect both the commercial shellfishery and future shellfishing.

2. The Energy Projections Of Islander East Upon Which The Proposal Rests Are Uncertain

The inordinate amount of briefing that Islander East has devoted to the “energy issue” is transparently designed to pressure the Secretary into ignoring the proper balance of considerations mandated by the CZMA. Islander East has steadfastly claimed that its project is a major step in the provision of much needed natural gas for the Long Island market; that it will have a cause-and-effect relationship to the conversion of oil burning electric generation facilities to gas-fired plants; and that it will increase efficiency and reliability. It will even improve the

⁴ See n. 40, *infra*, and accompanying text.

national security. Finally, in its supplemental briefing of August 20, 2003, the company claimed that the northeast power outage of August 14, 2003 proves conclusively that time is of the essence to approve more projects such as its own, and that the blackout would have been prevented if its supply agenda had been met earlier.⁵

The State of Connecticut would point out, however, that Islander's heavy reliance upon its own market data is likely not a valid reflection of current supply and demand. On July 9, 2003, the Connecticut Attorney General submitted comments to the DEP and appended to his letter an analysis prepared by a consultant, Philip Sussler, of the natural gas market issues reflected in Islander East's application materials.⁶ Mr. Sussler's summary and conclusions make the following pertinent observations: (1) the amount of need expressed by Islander East is not firm, because the power plant developers involved in precedent agreements from which the total amount of natural gas delivery have been derived do not need the incremental capacity that Islander East would seek to provide, or, in the case of the local gas distribution company, KeySpan Energy, the gas distribution company is a partner in the proposed pipeline, making its

⁵ On the contrary, the indications are that the blackout, itself a transmission and not supply issue, was more likely due to human error and related shortcomings of the Midwestern grid's internal responsiveness to upsets among its facilities, including information shortages not basic supply shortages. Lipton, Perez-Pena & Wald, "Overseers Missed Big Picture As Failures Led to Blackout," *New York Times*, September 13, 2003, pg. A-1, col. 1. The North American Electric Reliability Council concurs, pointing to the need for the establishment of mandatory, enforceable reliability standards. That is not a supply issue. The presidents of Duke Energy Islander East and KeySpan Islander Pipeline wrote to the Secretary of Energy on September 10, 2003, reiterating its claims and soliciting favorable comment on its appeal. Letter, Thomas C. O'Connor, Duke Energy Islander East Pipeline Co., LLC, and H. Neil Nichols, KeySpan Islander East Pipeline, LLC (September 10, 2003). The Secretary of Energy himself remains uncertain as to the cause of the blackout, and the investigation continues. Dept. of Energy, Order No. 202-03-2. *Attachment Item Nos. 5-7.*

⁶ The Attorney General provided Mr. Sussler's updated remarks to Mr. Evans on August 14, 2003. *Attachments, Item No. 8.*

long-term commitment to the utilization of the proposed supply unreliable; (2) Islander East's characterization of the natural gas market on Long Island "substantially overstates the anticipated growth of gas usage" and "substantially inflates the likely gas requirements of the power sector"; and, finally (3) the Islander East market study does not analyze the ability of increases in gas pipeline delivery infrastructure planned or already under construction for the greater New York City metropolitan area to displace any requirement for the "relatively small incremental volumes" which Islander East's proposed project will make available to Long Island. DEP Coastal Consistency Objection (July 29, 2003), Appendix H; *see also Attachments, Item No. 7*.

The Attorney General also pointed out that in present circumstances, where supplies of natural gas to New England is already stretched, additional "demand stress" competing for existing delivery capacity was problematic. Rising natural gas prices are likely to remain a fixture on the energy landscape for some time to come, which would inevitably have a limiting impact upon the potential gas markets that companies like Islander East would like to exploit, depressing the market for expansion or conversion from other fuels to natural gas. Letter of Richard Blumenthal, Attorney General to Charles H. Evans, Director, DEP Office of Long Island Sound Programs (July 9, 2003) at 8-9; *see also* updated remarks (August 14, 2003) at 3. Accordingly, the necessity for Islander East's proposed project is not substantiated so as to support the national interest claim that the company has made.

3. FERC environmental review under NEPA is narrower than and different from review pursuant to the state's CMP and the CZMA

Islander East insists that the FERC's canvass of environmental issues pursuant to its obligations as agency lead under NEPA is sufficient. This is incorrect. No agency of the

executive branch (the FERC included) of government, federal or state, and no court has ever confused the differences between a procedural decision making statute such as NEPA and a substantive statutory regime such as that contained in the CZMA and its associated state-level CMPs. The claim lacks a legal basis and support in the caselaw.

The enactment of the CZMA in 1972 was an expression of the need for both the federal government and the coastal states, which latter have a legitimate and important public trust proprietary interest in the regulation of water bodies and their adjacent and connected lands,⁷ to work cooperatively toward a goal of a structured assessment of resources and uses.

The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities, including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities", Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a). The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for anticipating and managing impacts from such facilities". § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time.

California v. Watt, 520 F. Supp. 1359, 1370 (C.D. Calif. 1981), *aff'd in part and rev'd in part on other grnds.*, 683 F.2d 1253 (9th Cir. 1982), *rev'd in part on other grnds., sub. nom., Sec'y of*

Interior v. California, 464 U.S. 312 (1984). The court in *Watt* captured the essence of the CZMA legislative initiative by remarking that:

At the outset, it should be noted that the CZMA has certain unique objectives which set it apart from the other statutes relied upon by defendants. NEPA, OCSLA, ESA, and the CZMA share the common goal of preserving and protecting the nation's resources. *Only the CZMA was intended to encourage active participation of state and local governments in developing and implementing the plans for meeting the common goal.* In the remaining statutes, Congress imposes certain responsibilities on the federal government and federal agencies without mandating participation by the states into the statutory scheme.

Id. at 1374-75 (emphasis added).

It was the choice of Congress to invite states into this federal level of environmental review, which is separate, coordinate and programmatically distinct from the NEPA review conducted by the FERC.⁸ See *Mtn. Rhythm Resources v. F.E.R.C.*, 302 F.3d 958, 960, 964 (9th Cir. 2002) (Congress has required the FERC to coordinate its licensure decisions with “certain specified federal and state interests” like CWA Section 401 and CZMA certification; CZMA issues “not generally within the mission and expertise of FERC.”) To view the CZMA review functions of the State of Connecticut and the Secretary of Commerce on an appeal of a coastal consistency determination without this understanding would throw out of balance the different functions of the agencies pursuant to their distinct statutory obligations. “Due to this significant

⁷ Because Long Island Sound is an estuary bounded by the states of Connecticut and New York, the submerged lands, the waters and resources of this water body are owned as well as managed by the two states.

⁸ The CZMA “reflects a strong congressional intent to give states and their delegates a more significant management role than the national government”. *Watt*, 520 F. Supp. at 1375, quoting Finnell, *Federal*

difference in objectives between CZMA and the other statutes, it is doubtful that it would be proper to interpret the CZMA in light of the other statutes.” *Watt*, 520 F. Supp. at 1375.

The CZMA guarantees that in states having approved CMPs, such as Connecticut, there will exist effective—not pro forma—regulation of activities within the coastal zone notwithstanding the fact that a given activity is subject to federal licensure proceedings or that the activity is proposed to be conducted by an agency of the federal government itself.⁹ In the communication of its objection to Islander East’s request for coastal consistency certification, on October 15, 2002, and after remand, on July 29, 2003, the DEP specified each of the state’s *applicable enforceable policies* in accordance with the requirements of the CZMA and the federally approved Connecticut CMP. Therefore, were the NEPA review of the FERC the only

Regulatory Role in Coastal Land Management, 1978 American Bar Foundation Research Journal 173, 249-250.

⁹ “It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them. Congress can hardly have had such an intent. The CZMA was purposely designed to encourage cooperation between federal, state and local governments rather than conflict, and it should be construed in a manner which will effectuate that purpose.” *Watt*, 520 F. Supp. at 1371-72. Congress articulated the point in the 1976 CZMA amendment process in the following manner:

“Section 307 is the portion of the Act which has come to be known as the ‘Federal consistency’ section. It assures that once State coastal zone management programs are approved and a rational management system for protecting, preserving, and developing the State’s coastal zone is in place (approved), the Federal departments, agencies, and instrumentalities will not violate such system but will, instead, conduct themselves in a manner consistent with the States’ approved management program. . . . As energy facilities have been focused upon more closely recently, the provisions of section 307 for the consistency of Federal actions with the State coastal zone management programs has [*sic*] provided assurance to those concerned with the coastal zone that the law already provides an effective mechanism for guaranteeing that Federal activities, including those supported by, and those carried on pursuant to, Federal authority (license, lease, or permit) will accord with a rational management plan for protection, preservation and development of the coastal zone. One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of Federal activities on the Outer Continental Shelf beyond the State’s coastal zones, including Federal authorizations for non-Federal activity, but under the act as it presently exists, as well as the S. 586 amendments, if the activity may

criterion upon which the State of Connecticut was supposed to have reviewed Islander East's requested certification of coastal consistency, the DEP would have ignored the terms of its CMPs enforceable policies.

Finally, it should not go without notice that the FERC, however highly it may regard its role as lead agency in the environmental review process required by NEPA, has in other proceedings before it involving pipelines and gas transmission proposals acknowledged the limits of that review as against environmental impact review pursuant to the CZMA. In the Millennium Pipeline Company's case,¹⁰ the FERC stated in its Order Issuing Certificate, Granting and Denying Requests for rehearing, and Granting and Denying Requests for Clarification (September 19, 2002), 100 FERC ¶ 61,277, that claims respecting its having failed to consider adequately certain CZMA issues "misapprehend[ed] the purpose of an EIS and the relationship between NEPA and the CZMA." Although the FERC asserted that its environmental staff had considered carefully the anticipated environmental impacts of the coastal zone, it nevertheless allowed that "[t]he EIS, however, is not intended to exhaustively analyze all issues arising under New York's Coastal Management Plan or other issues arising under the CZMA. Rather, those issues arise under the CZMA and are to be considered in the NYSDOS consistency determination under that statute, which was done, resulting in the May 9, 2002 objection by the NYDOS to the consistency certification for Millennium." Order (September 19, 2002) at ¶ 232.

affect the State coastal zone and it has an approved management program, the consistency requirements do apply." S. Rep. No. 94-277 (1975) at 36-37.

¹⁰ FERC Docket Nos. CP98-151-001 and CP98-151-002.

4. **The State Has Issued A Section 401 Certification Notification That The Proposed Project Is Inconsistent With Its Water Quality Standards**

On August 5, 2003, Connecticut's DEP Office of Long Island Sound Programs and the agency's Bureau of Water Management, Inland Water Resources Division, issued a Notice of Tentative Determination to deny Islander East's application for a certification under Section 401(a)(1) of the Clean Water Act Amendments to the Federal Water Pollution Control Act for inter alia discharges into navigable waters. 33 U.S.C. § 1341(a)(1). A final determination of denial will issue after close of the tentative determination comment period. Connecticut and New York both have responsibility for this certification process, since the pipeline will "originate" in both states in terms of its water quality impacts associated with carrying and laying the gas transmission pipeline along the proposed alignment. As recited in its notice, Connecticut evaluated the proposed project for compliance with Sections 301 through 303 and 306 through 307 of the CWA, the state's own Water Quality Standards ("WQS"), which have been adopted pursuant to state statute and approved by the federal Environmental Protection Agency, and, once again, the goals and policies contained in the state's Coastal Management Act ("CMA"). See 33 U.S.C. §§ 1311-1313; 1316-1317; Conn. Gen. Stat. § 22a-426; Conn. Gen. Stat. § 22a-92 *et seq.*

Connecticut's summary of its tentative determination of water quality denial pointed to inconsistency with its WQS, revised to December 17, 2002, as well as inconsistency with the CMA. The WQS have three major components: 1) designated uses; 2) criteria established to protect those uses; and 3) anti-degradation policies. The designated uses are based on the functions and values associated with a state's wetlands, waters and watercourses. These uses

have to meet CWA goals in order, inter alia, to allow for the preservation and enhancement of the quality of state waters for present and future for the protection and propagation of fish, shellfish, wildlife, and to offer conservation to agricultural and recreational uses in and on the water.¹¹ “Anti-degradation” is defined in the WQS as “a statement of practice required by federal law” which prohibits a state from lowering surface water quality classifications or standards; rather, the anti-degradation policy requires “the maintenance and protection of water quality in high quality waters.” WQS, Appendix (“App.”) A; *see* 40 C.F.R. § 131.12.

Attachments, Item No. 9. The policy specifically applies to any proposed new or increased discharge to the surface waters of the state, or “any activity . . . requiring Water Quality Certification pursuant to Section 401 of the Clean Water Act.” *Id.* The overall structure of the state’s WQS is thus designed to ensure that the protection of the aquatic community is afforded paramount consideration.

The Surface Water Standards directly applicable to this appeal include: “(1) It is the State’s goal to restore or maintain all surface water resources, including wetlands, to a quality consistent with their existing and designated uses and supportive criteria”; “(2) Existing water uses and the level of water quality necessary to protect the existing and designated uses shall be maintained and protected”; “(3) Surface water with a classification goal of B or SB and with an existing water quality better than established standards shall be maintained at their existing high

¹¹ Shellfish and shellfishing are integrally related water quality matters, insofar as “agriculture” embraces shellfishing as an activity to be preserved and enhanced by the application of the WQS. Section 1-1(q) of the Connecticut General Statutes defines “agriculture” to include “aquaculture,” that is, the taking of clams, oysters and other shellfish. Connecticut’s WQS recite the federal regulatory requirement that such standards should, “wherever attainable, provide water quality for the protection and propagation of

quality, unless the Commissioner finds . . . that allowing lower water quality is necessary to accommodate overriding statewide economic or social development, and that existing and designated uses will be fully protected.” The policy for SA waters forbids the Commissioner from affording less than full protection to existing and designated uses; for SB waters, the policy seeks to measure the impact upon existing, designated and potential uses, but even here, any appeal to the lowering of water quality on the basis of the necessity to accommodate overriding economic and social development “clearly in the public interest” demands that “existing uses will be fully protected.” WQS, App. A.

For Islander East’s proposed project area, the coastal water classification is “SB/SA” in the near-shore area, and “SA” in the area south of a line located between Outer Island and Brown Point on Connecticut’s coast.¹² The following key points support the DEP’s tentative denial¹³ and the instant appeal:

First, Connecticut’s treatment of Tilcon’s shipping channel, which Islander East’s HDD seeks to bypass, and where Islander East asserts that the DEP allows the dredging of sediments, does not constitute any inconsistency in the agency’s approach to activities in this area. The

fish, shellfish and wildlife . . . taking into consideration their use and value for . . . propagation of fish, shellfish and wildlife . . . and agricultural . . . purposes . . .” Connecticut WQS, *Introduction* at 4-5.

¹² Coastal and Marine Surface Waters, Class SA have the following designated use: “Marine fish, shellfish and wildlife habitats, shellfish harvesting for direct human consumption, recreation, and all other legitimate uses including navigation.” Class SB designated uses are as follows: “Marine fish, shellfish and wildlife habitat, shellfish harvesting for transfer to a depuration plant or relay (transplant) to approved areas for purification prior to human consumption, recreation, industrial and other legitimate uses including navigation.” For each WQS-related aspect of the proposed Islander East project, such as “suspended and settleable solids,” “silt or sand deposits,” and “turbidity,” the narrative anti-degradation standard is applicable.

¹³ The DEP will supplement the Secretary’s record as soon as a determination on the issuance of the sought for water quality certification is officially published.

shipping channel is integrally related to the need of a water-dependent use—a barging facility—to be able to off-load from the land to the water (*i.e.* place material on barges for transit), and maintenance dredging is unavoidable. Tilcon is a good example of a commercial/industrial facility that is in fact coastal and water-dependent. Moreover, Tilcon’s dredge area does not involve the removal of sediments from *undisturbed areas*; and does not interfere with shellfish beds or shellfishing, while Islander East’s proposed project does so; therefore, the former activity does not violate the anti-degradation policy of the state’s WQS (or enforceable policies of the state’s CMP) but the latter would do so by permanently disturbing shellfish habitat and permanently disrupting shellfishing in the pipeline project area.

Secondly, Islander East has done, if anything, only a limited amount of sediment testing, with a total of but twenty-three samples at one-mile intervals along the proposed alignment. FERC’s FEIS acknowledges that the preliminary results from these collections from composite (“homogenized”) sampling indicate that there were detectable amounts of heavy metals and arsenic between MPs 13 – 17 and MPs 24 – 30 at levels exceeding NOAA Effects Range-Low (“ERL”) sediment screening criteria and below the Effects Range-Medium (“ERM”) criteria indicating “moderate contamination.” FERC FEIS at 3.3.3.1. FERC states that the Connecticut DEP assessments “have not indicated that any contamination problems are present.” The lack of data, however, easily explains why assessments have not come to conclusions, and, not surprisingly, FERC recommended that Islander East file “complete site-specific contaminated sediment studies” with state and federal agencies in order to determine “which, if any, known or suspected contaminated sites require further investigation and what mitigation may be employed to minimize impact in the event that contaminated areas are crossed.” *Id.*

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Thirdly, not only has Islander East not provided such studies to Connecticut DEP to show what mitigation is possible.¹⁴ The undisturbed sediments of the alignment area are composed of fine particles that are tightly consolidated; when disturbed through dredging, these particles become loosely consolidated and dispersed into the water column, where wave action energy further disperses them thereby affecting nearby sea floor habitats, so-called “intensified suspended sediment-induced impacts in the far-field.” The predictable impact caused NOAA’s National Marine Fisheries Service to file comments on the Islander East project proposal supporting Connecticut DEP’s conclusion that long-term adverse environmental impacts would be associated with the pipeline’s construction. NOAA Fisheries Letter, June 4, 2003, to Brandon [sic] Blum, Office of General Counsel for Ocean Services. Since the extent of carry of *contaminated* sediment has not even been studied by Islander East, it cannot be said on the basis of the record as the company claims, that impacts associated with its pipe laying operations will be localized and of a short duration. I.E. Bf. at 41.

Fourthly, the HDD technology proposed by Islander East presents similar issues. FERC did not have any alternatives to study were HDD to fail, and Islander East has provided Connecticut DEP with no way to evaluate what would be done were the proposed technology to

¹⁴ The handling of the sediment contamination issue in the FEIS for this project raises disturbing questions respecting the FERC’s fidelity to the purposes of NEPA review; post hac “mitigation” is an inadequate substitute for information that is supposed to drive the ultimate decision on a major federal action. A “recommendation” to compile further studies on an issue that has important ramifications for the assessment of impacts upon the aquatic community defers an adverse environmental impact issue. Islander East’s insistence, therefore, throughout its papers, both to the Connecticut DEP CZMA review team and to the Secretary, that the FERC FEIS review authoritatively covers the entire range of environmental impacts in a manner that supports the company’s proposed project is not accurate.

fail, and failures are not an uncommon occurrence.¹⁵ This includes the release of bentonite beyond what the company has already predicted will be released to the environment from an unexceptional attempt to complete the drilling work. *See* FERC FEIS at 3.3.3.2. The company does not in fact have a data assembly of geologic cores that would allow it to quantify the likely risks associated with the proposed of HDD at the preferred location.

A CWA Section 401 certification denial will be determinative, because it will constitute a legal bar to the permitting of this project. Islander East must supply an approved certification or a certification with conditions to the Army Corps of Engineers (“ACOE”) for the latter’s CWA Section 404 permit process, and the FERC cannot issue its license without an affirmative determination of both CWA requirements. 33 U.S.C. § 1341(a)(1).

ARGUMENT

I. ISLANDER EAST’S REQUEST FOR OVERRIDE SHOULD BE REJECTED AND ITS APPEAL DISMISSED BY THE SECRETARY BECAUSE THE PROJECT IS INCONSISTENT WITH THE PURPOSES AND OBJECTIVES OF THE CZMA

The override provisions of the Coastal Zone Management Act authorize the Secretary to allow a project to go forward notwithstanding a state objection pursuant to its coastal management program *if* he finds that the project is either “consistent with the objectives or purposes of this title or is otherwise necessary in the interest of national security.” 16 U.S.C. §

¹⁵ Algonquin’s Hubline Project in the greater Boston area involved the utilization of HDD technology. The company, in a November, 2002, filing made to the FERC pursuant to one of the conditions of its license, reported a frac-out in Salem Harbor at ~ MP 24.45. The contractor’s efforts to remove the bentonite drilling fluids that had escaped were “delayed” for several days by inclement weather conditions. The company was unsuccessful in its attempts to seal the frac-out and continue drilling in the original pilot hole, necessitating a pull-back of some 1800 feet and a rerouting of the pilot hole at a different depth. *Attachments, Item No. 10.*

1456(c)(3). The burden of proof remains with the party seeking override that the activity proposed satisfies these statutory requirements. 15 C.F.R. § 930.130. The appellant bears both the burden of production and the burden of persuasion, and in the specific instance where insufficient information exists in the Secretary's record for him to make the required findings pursuant to these regulations, the appeal will be dismissed. *Appeal of Shickery Anton* (May 21, 1991) at 4; *Appeal of Chevron U.S.A., Inc.* (October 29, 1990) at 4-5. The language "consistent with the objectives or purposes" is explicated in the applicable regulations as follows:

- (a) The activity furthers the national interest as articulated in § 302 or § 303 of the Act, in a significant or substantial manner,
- (b) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively.
- (c) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the management program. When determining whether a reasonable alternative is available, the Secretary may consider but is not limited to considering, previous appeal decisions, alternatives described in objection letters and alternatives and other new information described during the appeal.

15 C.F.R. § 930.121.

The appellant must succeed in demonstrating that its proposed project satisfies each of these three grounds; otherwise, the state's consistency objection stands and the appeal is liable to dismissal. The validity of the state's consistency determination is not the primary focus of the request for override; for the purposes of the Secretary's review the state coastal consistency determination is presumed correct. The review of the Secretary is in the nature of the application of a judicial review standard to an existing administrative agency record of decision, with the

additional authority provided to the Secretary to receive additional comment from other federal agencies and to conduct a public hearing for the receipt of same, and to address the issue of alternatives in light of materials received in the Secretary's record of decision in addition to the record before the state agency at the time that it conducted its coastal consistency determination and lodged its objection to the proposed project. *Id.*; see *Appeal of Southern Pacific Transportation Co.*, (September 24, 1985) at 4-5.

A. **Proposed Project Does Not Further The National Interest In Substantial Manner**
“use” and “development” inherent in the CZMA is apparent

in the detailed congressional findings and declaration of policy with which the Act commences. See 16 U.S.C. § 1451(a) – (g) and (k) – (m), inclusive; 16 U.S.C. § 1452(1), (2)(A) – (F) and (K). Section 1452(2) declares that it is the “national policy” to “encourage and assist the states to exercise effectively their responsibilities in the coastal zone . . .” The Congress has in turn found that “[t]he key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone . . .” 16 U.S.C. § 1452(2); § 1451(i).¹⁶

The Secretary has explained that the determination of whether a project significantly or substantially furthers the national interest implicates three factors for consideration: (1) the “degree to which the activity furthers the national interest”; (2) the “nature or importance of the

¹⁶ NOAA's regulations commentary states that Congress “specifically chose the States as the best vehicle to further this national interest” [that being the “effective management, beneficial use, and development of the coastal zone”]. 65 F.R. 77,149 (December 8, 2000).

national interest furthered as articulated in the CZMA”; and (3) the “extent to which the proposed activity is coastal dependent.” 65 F.R. 77,150 (December 8, 2000).

Islander East asserts that its proposed project will further the following national interest objectives: (1) the national interest in siting major energy facilities; (2) contribution toward the goal of national energy self-sufficiency; (3) fostering of the need for compatible economic development; and (4) protection and development of resources in the coastal zone. These claims are inaccurate.

1. The Siting of Major Energy Facilities

Islander East asserts that, since the CZMA provides that “priority consideration should be given to siting major facilities related to energy,” its project is in the national interest. It is not correct that the company’s proposed project falls within this category. NOAA’s commentary, which the company quotes, states that “energy facilities” or “OCS [outer continental shelf] oil and gas development” are “coastal dependent industries with economic implications beyond the immediate locality in which they are located.” 65 Fed. Reg. 77150.¹⁷ The discussion, in context, makes it clear that NOAA was not referring to the mere location of pipeline passing *through the coastal zone*. In Islander East’s case, no “facility” is “sited” in the manner of, for example, a marine terminal for the off-loading of oil or gas. The distinction bears directly upon Connecticut’s Coastal Management Act (“CMA”), Section 22a-93(14) (“facilities and resources which are in the national interest”), insofar as the latter refers to “energy facilities serving state-wide and interstate markets, including electric generating facilities and facilities for storage,

receiving or processing petroleum products and other fuels . . .” Citation by the DEP to this policy clearly amounts to no “concession” at all on the state’s part that without more a project like Islander’s is a “national interest” facility by definition. In short, Islander East’s proposal is for a pipe, and that pipe constitutes no facility that is inherently of any greater importance in CZMA terms, certainly of no greater importance in respect to its alignment, than the protection and conservation of important and sensitive coastal natural resources located in the same area. Neither is the company’s proposed project of greater importance than other consistent land and water uses located or proposed to be located within the coastal zone.

Undoubtedly recognizing the weakness of its case that the pipeline is a coastal dependent major facility, Islander East has raised the unprecedented argument that because Long Island is an “island” and the company cannot reach it except by water; therefore, its proposal demonstrates coastal dependency. I.E. Supp. Bf. at 13-14. The argument elides over the salient aspect of the applicable criterion, the quality of preference in siting coastal facilities. Where this or any pipeline enters the water is utterly variable; where, however, a docking facility can be placed is in fact dependent upon the nature of the coastal resources available. That is true for either end of the waterward aspects of the pipeline, on either shore.¹⁸ Therefore, Long Island’s

¹⁷ The Secretary has, for example, referred to such OCS proposals as included within the objectives of the CZMA, that is, they lie on the “development” side (as opposed to “protection side”) of coastal resources. *See, e.g., Appeal of Gulf Oil Corporation* (December 23, 1985) at 4.

¹⁸ Islander East notes that it has received a coastal consistency certification from the State of New York. Given the differences in the geology and resources of the Long Island side of the Sound vis-à-vis the Connecticut side, the issuance of the New York certification is immaterial to the present consistency objection appeal. All of the major estuarine resources in the Sound, as well as its most complex geology, are on the northern, or Connecticut, side of the Sound, where bedrock is at or near the surface in many places, such as the Thimble Islands. Beaches on the Connecticut side are largely confined by rocky headlands that interrupt sediment transport, and in the embayments created by the general north-

geographical status as an island is irrelevant. Islander East must prove its case in respect to the governing regulatory requirements.

Congress' declaration of policy not only recites, as noted above, that the states should be encouraged to "achieve wise use of the land and water resources of the coastal zone, giving *full consideration* to ecological, cultural, historic, and esthetic values as well as the needs for compatible economic development, *which programs should at least provide for—* (D) *priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities . . .*" 16 U.S.C. § 1452(2) and (2)(D) (emphasis added). Priority is thus given by the terms of the CZMA to uses that demonstrate coastal dependency. *Appeal of Heniford* (May 21, 1992) at 11. The pipeline is not of its nature "coastal-dependent"; neither need it be subject to anything more or less than an "orderly process" (not a "priority process"). Cf. ACOE Correspondence (May 21, 2003) from Christine Godfrey, Chief, Regulatory Division, to Gene Muhlherr, Islander East Pipeline Co., LLC, at 2 (for Clean Water Act Section 404 review purposes, and guidelines promulgated thereunder, "[t]he basic project purpose of the Islander East project is *transmission of natural gas*, and consequently, is considered a non-water dependent activity")(original emphasis). *Attachments, Item No. 12*. Thus, while Islander East asserts that its project *is* a water dependent use and that it does *not* displace any other water-

south grain of the bedrock, and leeward side of the islands, low energy environments are common and deposition of fine-grained sediment is typical. Long Island's north shore, however, presents an altogether different geological profile; it is glacial moraine, and the crystalline bedrock is over a thousand feet below the surface, having no influence on the morphology and aspect of the shoreline. Here, high energy environments predominate, moving glacial material along wave-cut terraces. Correspondence, Ralph Lewis, State Geologist (ret.), Long Island Sound Resource Center, to Susan Jacobson, CT-DEP (September 29, 2003). *Attachments, Item No. 11*.



dependent use, its project is not entitled to priority consideration as a major energy facility under the CZMA.

States that seek to have approved coastal management programs must address the siting of major energy facilities, and Connecticut's CMA does that, and does so in a manner that engages the coastal-dependency criterion. *See* 16 U.S.C. § 1455(d) (2)(H); *see also* Conn. Gen. Stat. § 22a-90 *et seq.* Connecticut, like other participants in coastal management, was required to provide no more than "adequate consideration of the national interest involved in . . . managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. *In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program.*" 16 U.S.C. § 1455(d)(8).¹⁹ (Emphasis added.) Connecticut complied in its 1980 CMP. *Attachments, Item No. 13* (Excerpts, Parts IX.A [national interest] and X.A [energy facilities]).²⁰

The import of this statutory language, recognized in NOAA's regulations, is that any coastal management planning process of a state must address the national interest in planning for and siting coastal-dependent energy facilities, but it need not categorically *accept* such facilities in order to participate in the coastal management program process set up by the CZMA. Thus,

¹⁹ *Cf.* 40 Fed. Reg. 1683 (January 9, 1975) ("A management program which integrates . . . the siting of facilities meeting requirements which are of greater than local concern into the determination of uses and areas of statewide concern will meet the requirements of [the Act].")

²⁰ Congress restricted the Secretary to evaluating the adequacy of a coastal state's planning process, and forbade him from "intercession" in "specific siting decisions." S. Rep. No. 277, 94th Cong., 1st Sess. 24 (1975) [re 1976 energy amendments to CZMA]. The meaning of this directive, and of the CZMA itself, is that there exists *no* substantive requirement that would force a state to site an energy facility because it is an energy facility and no more.

Section 923.15(b) of NOAA's regulations states that this requirement of including energy facilities in the planning and management process:

should not be construed as compelling the States to propose a program which accommodates certain types of facilities, but to assure that such national concerns are included at an early stage in the State's planning activities and that such facilities are not arbitrarily excluded or unreasonably restricted in the management program without good and sufficient reasons. . . . No separate national interest "test" need be applied and submitted other than evidence that the listed national interest facilities have been considered in a manner similar to all other uses, and that appropriate consultation with the Federal agencies listed has been conducted.

The following state legislative findings, goals and policies underscore the state's due consideration of these requirements. Connecticut's General Assembly has found that "(5) The coastal area is rich in a variety of natural, economic, recreational, cultural and aesthetic resources, *but the full realization of their value can be achieved only by encouraging further development in suitable areas and by protecting those areas unsuited to development.*" Conn. Gen. Stat. § 22a-91(5) (emphasis added). The CMA expresses particular goals and policies, among them the charge to "preserve and enhance" coastal resources in accordance with existing statutory programs designed, inter alia, to regulate water quality, impacts upon wetlands, the construction of structures and dredging; and to give "high priority and preference" to uses and facilities which are "dependent upon proximity to the water or the shorelands immediately adjacent to marine or tidal waters." Conn. Gen. Stat. § 22a-92(a)(2), (a)(3). A policy of the greatest relevance for this consistency appeal is the following:

To insure that the state and coastal municipalities provide adequate planning for facilities and resources which are in the national interest as defined in Section 22a-93 and to insure that any restrictions or exclusions of such facilities or uses are reasonable. *Reasonable grounds*

for the restriction or exclusion of a facility or use in the national interest shall include a finding that such a facility or use: (A) May reasonably be sited outside the coastal boundary; (B) fails to meet any applicable federal and state environmental, health or safety standard . . .

Conn. Gen. Stat. § 22a-92(a)(10) (emphasis added). Additional policies within the CMA underscore the preference (“highest priority”) for water-dependent uses; “highest priority” for “commercial . . . fishing and boating uses”; the requirement that structures in tidal wetlands and coastal waters be designed, constructed and maintained “to minimize adverse impacts on coastal resources, circulation and sedimentation patterns, water quality, and flooding and erosion . . .”; to “protect and where feasible, to upgrade facilities serving the commercial fishing . . . industries” and to “maintain existing authorized commercial fishing . . . boating harbor space”; to “preserve tidal wetlands and prevent the despoliation and destruction thereof in order to maintain their vital natural functions” and “to encourage the creation of wetlands for the purposes of shellfish and finfish management, habitat creation . . .”; to “manage undeveloped islands in order to promote their use as critical habitats for those bird, plant and animal species which are indigenous to such islands or which are increasingly rare on the mainland . . . to disallow uses which will have significant adverse impacts on islands or their resource components”; to “disallow new dredging in tidal wetlands except where no feasible alternative exists and where adverse impacts to coastal resources are minimal”; to “manage the state’s fisheries in order to promote the economic benefits of commercial . . . fishing, . . . optimize the yield of all species, prevent the depletion or extinction of indigenous species, maintain and enhance the productivity of natural estuarine resources and preserve health fisheries resources for future generations[.]” Conn. Gen. Stat. § 22a-92(b)(1)(A), (C), (D), (I); § 22a-92(b)(2)(E), (H); § 22a-92(c)(1)(E), (I).

Connecticut's federally-approved CMP and FEIS, prepared jointly by NOAA and DEP, emphasized that under the CZMA the priority consideration of the siting of energy facilities was *not required*, stating that "[t]he national interest in energy is not to be placed above other national interests." *United States Department of Commerce Final Environmental Impact Statement and the Proposed Connecticut Coastal Management Program* (1980) ("CMP/FEIS") at II-273. *See, e.g., American Petroleum Inst. v. Knecht*, 456 F. Supp. 889, 922-23 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979).²¹ The CMP/FEIS also recites the view of the Department of Energy that it "does not conclude that energy projects must be permitted in the coastal zone simply because they are of larger than local nature[.]" and observes that a coastal management program must have a "balancing of the national interest in energy self-sufficiency with state and local interests involving social, environmental and economic factors."

Finally, Connecticut's CMP/FEIS recites the views of FERC that "a balancing of conflicts between energy facilities and other interests is not for federal agencies to determine. Rather, it is a problem 'the state must decide on the basis of all national interest considerations along its coast.'" CMP/FEIS at II-274.²² The CMP/FEIS, in a discussion of energy facility siting in the more appropriate context (in contrast to Islander East's pipeline) of energy

²¹ The court in *American Petroleum Inst.* observed that the CZMA had been amended in 1976, in part, in reaction to the 1973 Arab oil embargo, and that the amendments, while recognizing the national interest in "the planning for and siting of energy facilities, nevertheless *did not alter the requirement of 'adequate consideration' in § 306(c)(8) or make any changes in the degree of specificity required under the Act.*" 456 F. Supp. at 923 (emphasis added). The court noted that Congress "did not assume that such siting [of energy facilities] was automatically to be deemed necessary in all instances," and rejected the suggestion that energy facilities were entitled to a "zoning map" that would "implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone" *Id.* at 924-26.

generation facilities, speaks of outer continental shelf (“OCS”) “pipelines and shore terminals” as requiring a balancing of interests including adverse environmental impacts associated with dredging and filling.²³ According to the CMP/FEIS, the OCS activities are recited as important national assets in the National Energy Plan that nevertheless should be “developed in an orderly manner consistent with national energy and environmental policies.” *Id.* at II-286.

Islander East insists that a gas transmission pipeline, sited in the coastal zone, without more, is entitled to priority over other CZMA (and CMA) policy objectives. Neither the Act nor NOAA’s regulations will support that contention. Islander East insists that the FERC’s responsibilities under the National Gas Act cancel out the applicability of the CZMA to the licensure process in which it is engaged. I.E. Bf. at 30-31, quoting *Certificate Order*, 100 F.E.R.C. 61,276 at ¶ 63. Islander East has told the DEP that neither its Section 401 water quality certification review, nor its CZMA review are independent of the FERC’s NEPA review. Letter of Gene H. Muhlherr to Charles H. Evans, DEP-OLISP (May 27, 2003) at 5 and n. 7.²⁴ *Attachments, Item No. 14.* The company argues that the important national goals and objectives of the CZMA are subservient to the National Gas Act. (The FERC has asserted that state

²² “The Connecticut Coastal Area Management Program considers energy facilities serving statewide and interstate markets to be in the national interest, *but an interest on a par with other resources and facilities of national importance.*” Connecticut CMP/FEIS at II-274 (emphasis added).

²³ Indeed, the only “concession” made to coastal dependence is that accorded “for the most part” to “receiving and handling facilities” designed to receive off-loaded commodities such as oil. CMP/FEIS at II-286.

²⁴ There is no legal support for the proposition advanced by Islander East that a state certification review pursuant to the CZMA and its own federally-approved CMP is pre-empted.

environmental programs and licensure matters directly related to the Islander East proposed project are simply pre-empted by the NGA. *Id.* at ¶ 65.)²⁵

The FERC has conceded that the Secretary's authority under the CZMA is a *coordinate, not subordinate* review authority. Order On Remand, January 17, 2003, at ¶ 115, 119. As explained by the Secretary himself in *Appeal of Mobil Exploration, supra*, the national interests to be balanced in the second element of the consistency appeal process "are limited to those recognized in or defined by the objectives and purposes of the CZMA. *Id.* at 39, citing *Appeal of the Korea Drilling Co., Ltd.* (January 19, 1989) at 16. Finally, NOAA's December 8, 2000 Rules and Regulations commentary affirmed that NEPA review does not necessarily satisfy all the consistency requirements of the CZMA review process: "NEPA and the CZMA have different 'effects tests.' Thus, it may be that a NEPA document *may not contain the needed CZMA information or that a conclusion regarding effects for NEPA purposes will not satisfy the CZMA effects test.*" 65 F.R. (December 8, 2000) at 77,139 (emphasis added).

Connecticut evaluated Islander East's project in the context of these mandated coastal values, and did so in the proper discharge of the processes and policies of its federally-approved CMP. The DEP concluded that the company's pipeline, as proposed, would not be compatible with the ecological conditions pertaining in the Thimble Island reach of the Sound, and, therefore, that it should not be sited along Islander East's chosen route. Islander East is not advancing a national interest that is superior to other competing schemes to route gas or

²⁵ The FERC asserts in its order that it possesses a "broader mandate" to promote, inter alia, a[n] "environmentally responsible interstate natural gas pipeline infrastructure[.]" Order, Sept. 19, 2002 at ¶ 63.

proposing a project that is entitled to any priority, particularly in light of the long-term adverse impact of its proposed project on the environment.

2. Enhancing the Goal of National Energy Self-Sufficiency

Islander East's claim that its proposed project will move the nation closer to energy self-sufficiency is patently false. The project has no relation to the development of any domestic sources of natural gas that will make the nation less dependent upon foreign sources of energy. The project does not realize the CZMA legislative finding respecting the promotion of energy-self sufficiency. 16 U.S.C. § 1451(j). All of the gas that Islander East would move through Connecticut and across Long Island Sound to New York is nothing less than additional foreign gas from Canadian sources and other foreign sources, that is, from Western Canada, from the Sable Island region of the Scotian Shelf, Liquid Natural Gas ("LNG") from sources such as Trinidad. The demand by U.S. markets for Canadian natural gas has risen steadily since 1995, and the overall percentage of U.S. gas importation attributable to Canadian sources was calculated at approximately seventeen (17%) for the year 2001. Canadian natural gas importation totaled some 3.7 TCF (trillion cubic feet) in 2001, an approximately six percent (6%) increase over the previous year, 2000. New York State Research and Development Authority, *New York State Energy Plan and Final Environmental Impact Statement* (June, 2002) ("New York State Energy Plan") at 3-162.²⁶ Eighty-nine percent (89%) of the natural gas traveling into New England derives from Canada; the remaining eleven percent (11%) is LNG,

²⁶ The *New York State Energy Plan* may be accessed at <http://www.nyserda.org/sep.html>.

off-loaded in Massachusetts for injection into the system. Task Force Report (Part II, June 3, 2003) at 62.²⁷

The government of Canada is a “foreign” government. The CZMA does *not* extend beyond our border with Canada. *See, e.g.* 16 U.S.C. § 1453(1). Consequently, Islander East argues that substituting *foreign gas* for *foreign oil* meets the goal of energy self-sufficiency.²⁸ There is no guarantee that Canada would not in its own self-interest restrict future shipments of natural gas to the United States as it did in the 1970s when the Canadian National Energy Board placed a ban on the exportation of natural gas from Canada’s western provinces to U.S. markets.²⁹ Weinberg, “Boundary Waters of New York and Ontario,” 1 Sea Grant L.J. 255, 299 (1976).³⁰ As noted earlier, certain amendments to the CZMA in the 1970s put into higher relief the “national objective” of “increasing *domestic* energy production.” *Am. Petroleum Inst.*, 456 F. Supp. at 923 (emphasis added), quoting H. Rep. 94-1298 at 25, U.S. Code Cong. & Admn. News, pg. 1822; *see also Appeal of Mobil Exploration & Producing* (June 20, 1995) at 39-40. Islander East’s argument does not address the point of domestic energy self-sufficiency, and its argument should not be credited by the Secretary.

²⁷ The *Long Island Sound Task Force Report*, Part II, may be accessed at <http://www.sustainenergy.org>.

²⁸ The shallowness of this claim is only heightened by the linkage that Islander East attempts to secure between the promotion of its project and the avoidance of “turmoil in the Middle East.” I.E. Opening Bf. at 37. The August 14, 2003 blackout as noted above, has nothing to do with gas supply; much to do with human error and the manner in which the Midwestern grid is set up and monitored.

²⁹ Islander East will, it claims, be making available to the Long Island market western Canadian supplies in addition to natural gas from east coast Canadian supplies via the Algonquin pipeline system. I.E. Opening Bf. at 36, citing Islander East’s market data.

³⁰ Canada’s energy minister at the time, Donald MacDonald, warned of cut-backs in gas export to the United States. *See Weinberg, supra*, at n.178, citing *The New York Times* at 35 col. 5 (July 29, 1975).

3. *Promoting Economic Development*

Islander East asserts that, because there is a need for compatible economic development in the coastal zone, and because the Secretary has determined that compatible economic development is a CZMA objective, its proposal will facilitate those objectives by serving two areas within the coastal zone with its proposed pipeline from Connecticut to Long Island. The proposed project is not in accord with the CZMA policy to “encourage . . . states to achieve wise use of the land and water resources of the coastal zone, *giving full consideration* to ecological, cultural, historic and esthetic values as well as the needs for compatible economic development . . .” 16 U.S.C. § 1452(2). This simplistic reasoning ignores all of the factors outlined by Congress in this declaration of policy, and, in particular, factors (C) and D) which require the state to “protect natural resources and existing uses of those waters” and to give “priority consideration” to “coastal-dependent uses.” 16 U.S.C. § 1452(2)(C), (D).

Without close attention to coastal management goals and policies in reviewing siting approvals, there can be no truly “compatible” economic development: it will not suffice to reiterate mantra-like the slogans of “increased reliability,” “security,” “market competition” and “added infrastructure.” The CZMA standard that applies is one of appropriate weighing by the state in light of these applicable goals and policies. For this reason state CMPs were developed and federally approved under the enabling legislation.

Islander East’s proposed project, however, is not in accord with the array of policies set forth in Section 1452 of the Act. It is not coastal dependent. It will occasion harm to natural resources and existing uses of the coastal waters. Its proposal is but one of several designed to transfer natural gas supplies from one area of the northeast to another. The 2002 New York

State Energy Plan catalogued the existence of eleven of them. The New York Plan predicts no dire need for pipeline expansion projects. The FERC has approved nine projects to serve the Northeast Region, and another eleven have been proposed. *New York State Energy Plan* (June, 2002) at 3-177; *see also Final Report: The Ability to Meet Future Gas Demands from Electricity Generation in New York State* (Chls. River Assocs.)(July, 2002).³¹ I.E. Vol. 5 Item No. 32. “Not all of these projects will be built, as some are competing to effectively serve the same markets and some are seeking markets that will not evolve.” *Id.* at 49. Finally, it should be made clear that there is no simple calculus to determine a cause-and-effect relationship between natural gas supplies and the electricity generation infrastructure. According to the aforementioned report:

The extent to which new infrastructure will be added and existing infrastructure retired will depend on factors such as siting and environmental approvals, approval of tariff rates, and economic viability of projects. In addition, the rules and operating requirements of both the gas electric markets/systems must be understood before one can characterize how the gas and electric systems will be integrated to meet future electricity and gas demands.

Id. at 32-33. In particular, the natural gas spin on the two issues of electrical load growth and the addition of new gas-fired electric generating capacity is complex and “cannot be determined without a detailed analysis of the competition among existing and new units in the electric marketplace . . .” *Id.* at 34. That inquiry is further complicated by the realities of real-time

³¹ The report, commissioned by the N.Y. State Energy Research and Development Authority and the N.Y.I.S.O., generally concludes that projected natural gas supply needs (of 465 MDT/d would be met by recently completed or nearly completed infrastructure expansions expected to be on line by the end of 2003, and, further, that this additional capacity “exceeds forecasted growth in nongeneration gas demands through at least 2005.” Islander East is not in this calculus, as even a casual perusal of the report shows.

market forces that, for example, currently do not favor investment growth in electric generation. *See, e.g.,* N.Y. State Energy Plan, *supra*, at § 3.4 (Electricity Resource Assessment).

Therefore, since Islander East would not supply any natural gas that is indisputably needed to meet the region's energy requirements, the company's claim that its proposal is a necessary infrastructural enhancement, without more, cannot meet this prong of the CZMA's national objectives.

4. Protecting Natural Resources in the Coastal Zone

Islander East's claims for the purported benefits associated with its proposed project are extensive: the pipeline will reduce air emissions; improve water quality; protect fishery resources with an overall outcome that "preserves, protects and enhances" the resources of the coastal zone. The record does not support these assertions.

First, since Islander East's project is not the only possible configuration being considered by regulators for the provision of increased natural gas supplies to Long Island, there is no necessary connection, for example, between what air emissions reductions *this project* might engender and the need to reduce air pollution in the region. Natural gas from *any* new sources might lead to a decrease in air emissions, but Islander East has not demonstrated how much air quality benefit over oil generation could be achieved that would be attributable to its project. The company's proposal offers no distinct air quality advantage, for example, over any other possible natural gas pipeline routes. Plant improvements to existing generation facilities' air emissions equipment would, for example, also provide cleaner air emissions without any of the impacts associated with Islander East's project.

Secondly, Islander East is completely silent about what the environmental trade-off is in order to reap these so-called benefits to the coastal zone. Islander East's project will cause serious adverse environmental impacts. The project will trench and blast its way through tidal wetlands and shellfish beds; release bentonite into the waters of the Sound; and trench a pipeline for over twenty miles before arriving on the New York side of the Sound. The proposed project area footprint in the Sound will cover over 1,270 hectares. There is no assurance that the HDD drilling will not fail and cause additional adverse environmental impacts, and all of this impact is located in a unique and environmentally sensitive reach of the Connecticut coast.

Against this broad set of adverse environmental impacts, Islander East in passing merely notes that the operational status of its proposed project would "reduce surface transportation of fossil fuels and potential water quality impacts associated with air emissions." I.E. Opening Bf. at 35. Islander East has studied none of these assertions. Taking the company's claim on its face, there is no basis in the record to conclude that the surface transportation of fossil fuels poses a quantitative risk that Islander East's project would ameliorate, or, as noted above, that its project will have a direct causal relationship to air quality improvement, much less what improvement in *water quality* would result. The record does not support why Islander East's natural gas, as opposed to any other proposal's gas, were it actually to achieve the off-sets claimed, is *particularly needed* or preferable.

The FERC FEIS concluded that "from an environmental perspective there is a preferable *system alternative* to the proposal." FEIS at 5-1 (emphasis added). All that Islander East has to support its contention that the proposed project will be beneficial for the coastal region is the FERC's order approving the pipeline route. FERC Order, September 19, 2002, 100 FERC

¶ 61,276 and Order On Remand, January 17, 2003, 102 FERC ¶ 61,054. The FERC issued its order a mere month after the filing of the FEIS, and later reaffirmed it, dismissing or ignoring, however, the fact that regulatory agencies, like the United States Environmental Protection Agency (“U.S.-EPA”, “EPA”) had serious concerns about the quality of the FERC staff’s environmental impact analysis. EPA stated flatly that:

the FEIS lacks the detailed information necessary to understand the direct, indirect and secondary impacts to wetlands and waters of the United States associated with the proposed project. Assessment of indirect and secondary impacts is essential to understanding the full scale and significance of environmental impacts. . . . This lack of detailed information . . . makes it difficult to determine the relative impacts of various alternatives

Correspondence, U.S.-EPA to the FERC, September 30, 2002. Consequently, the EPA stated that it “could not agree with . . . the FERC which concludes that ‘[the Islander East proposal] would result in limited adverse environmental impacts.’” *Id.* The EPA reiterated that assessment in comments to the ACOE as recently as last month. Letter, Lynne A. Hamjian, Mgr. US-EPA Connecticut State Program Unit, to Christine Godfrey (ACOE), with attachment. *Attachments, Item No. 15.* The Army Corps of Engineers, from which Islander East must obtain a license in order to proceed with its proposed project, after review of the draft EIS, stated that “[t]he analysis does not contain sufficient information to make a reasonable determination as to whether the proposed discharge will comply with the [ACOE] guidelines,” and expressed the

need for alternative alignment, indicating that the ELI Extension alternative at least suggested less environmentally deleterious route through the Sound.

The FERC has concededly not addressed in its FEIS all of the coastal zone impacts associated with the proposed project. As the Connecticut DEP pointed out, Islander East asserted before the agency that the FERC had already determined the nature of environmental impact and, tellingly, of alternatives. DEP Coastal Consistency Objection (July 29, 2003), App. G. Since it is the state's obligation and responsibility to determine whether the company's proposed project was consistent with the CZMA and the CMP objectives of protecting coastal resources, and the FERC itself has a record endorsing the relative allocation of authority between it and the Secretary on these critical issues of coastal consistency, there is no legal support for Islander East's position.

Thus, Islander East has not been able to support its claim that its proposed project achieves the national objectives of the CZMA either significant or substantial. There is no substance to the legal or factual claim that a gas transmission pipeline such as proposed should be granted priority consideration within the coastal zone. A gas transmission pipeline in and of itself is not coastal dependent, and such as Islander East's proposed pipeline that will bring more foreign gas into the distribution system will not promote any national goal of domestic energy self-sufficiency. Islander East's proposed project will not make any unique contribution to reconstituting the energy supply system in this region; it will, to the contrary, make a unique contribution to the despoliation of priceless natural resources in

The ACOE has since then reiterated this point in respect to the FERC FEIS Correspondence, C

Long Island Sound. It serves no purposes on the “development” side of CZMA coastal zone goals, but offers distinct “losses” on the resources side of the statute’s objectives and policies. Other proposals serving the same general market area would perform the same function as Islander East’s project, but without endangering the ecology of the Thimble Island area or damaging vital coastal and water dependent activities such as shellfishing. In sum, the national interest is disserved by Islander East’s proposed project, and the Secretary should find that the company has not carried its burden of proof and persuasion on this element.

B. The National Interest Purportedly Advanced By The Proposed Project Fails To Outweigh Its Adverse Coastal Effects, When Those Effects Are Considered Separately Or Cumulatively

The second required element that Islander East must demonstrate is that “[t]he national interest furthered by the activity outweighs the activity’s coastal effects, when those effects are considered separately or cumulatively.” 15 C.F.R. § 930.121(b). The Secretary has stated in commentary to the NOAA regulations that this inquiry is designed to ensure that he “overrides a State’s objection only where the activity *significantly or substantially* furthers the national interest and that interest outweighs the adverse coastal effects of the activity.” 65 F.R. 77,149 (December 8, 2000) (emphasis added).³³ The “coastal effects” to be considered by the Secretary are broad-ranging in scope, embracing not only the effects occasioned by the proposed activity in

Godfrey, Chief, Regulatory Division (May 21, 2003) to Gene Muhlherr, Islander East Pipeline Co., LLC.; *see also* Correspondence, C. Godfrey (ACOE) (June 17, 2002) to the FERC.

³³ In relation to state CMPs, what this means is described by the Secretary in this way: “The Secretary’s review is an independent assessment of the proposed activity and whether the proposed activity meets the objectives of the CZMA or is necessary in the interest of national security. . . . Although one of the central goals of the CZMA is to encourage State management of coastal resources, the Secretary’s review is available to ensure that proposals that further the national objectives articulated in the Act may be allowed to proceed notwithstanding their inconsistency with the enforceable policies of a . . . management program. 65 F.R. 77,149 (December 8, 2000).

isolation, but also those effects that arise from the proposed activity being undertaken in combination with other activities that have an impact upon coastal zone resources. Adverse impacts associated with the proposed activity may be either direct or indirect, and may also arise from accidental or unsanctioned activities. *Mobil Exploration & Producing, U.S., Inc.* (June 20, 1995) at 13; *Appeal of Korea Drilling Co., Ltd.* (January 19, 1989) at 10; *Appeal of Texaco, Inc.* (May 19, 1989) at 6-7.

The national interests to be factored into the analysis under this aspect of the appeal process “are limited to those recognized in or defined by the objectives and purposes of the Act.” *Id.* at 16. Islander East’s insistence that its proposed project contributes to the national interest as detailed above.³⁴ Were its proposed project within those parameters that appropriately describe the furtherance of the national interest, the company would nevertheless have presented a proposal that does not outweigh the adverse environmental impacts associated with it.

1. *Islander East’s Project Will Have A Major Adverse Impact Upon The Thimble Islands Region Of Connecticut’s Coastal Zone*

a. The Impact Area:

The DEP’s determination after remand, dated July 29, 2003, affirmed its prior objection to Islander East’s request for coastal consistency certification, and amplified its prior discussion respecting the quality and nature of the coastal resources that would incur adverse environmental impacts based upon the company’s chosen alignment. In a section devoted to “natural features,” the agency noted that the project extends into the midst of the Thimble Island complex, an

³⁴ The preamble to the earlier (1979) iteration of the Secretary’s regulations stated that an objection to coastal consistency would not be set aside unless the national interest benefits of a proposal “significantly” outweighed the negative impacts upon coastal zone management resources. 42 Fed. Reg. 43594. It is noteworthy that NOAA’s 2000 revisions to its regulations expressly stated that it was

aggregation of 141 islands and exposed rocky outcroppings that create a total of 15 miles of coastline within a linear reach of 6.2 miles. Not only is this a high concentration of “coast” within a relatively small area, but the topography is absolutely unique to Long Island Sound: its like is found nowhere else up and down this major estuary. DEP Coastal Consistency Objection after Remand (July 29, 2003) at 3; *see also* Correspondence, Ralph Lewis, Long Island Resource Center, *supra*. By percentage, this segment of the Connecticut shore contains nearly three times the percentage of bedrock—56.3 percent—as any other.³⁵ Islander East contends that the pipeline is nowhere near the Thimble Island complex; but the company’s claim is erroneous. *See, e.g.*, Shellfish Bed Maps, appended; DEP Coastal Consistency Objection (July 29, 2003) at App. E.

There is much natural diversity associated with these congeries of bedrock outcroppings emerging from shallow (~ 30 feet) waters. This diversity embraces subtidal areas with varying characteristics that support a wide range of benthic organisms “each in their own way critical to the overall health and rich diversity of the surrounding marine ecosystem.” The benthic features include a variety of substrates that support “robust shellfishing grounds suitable for hard clams, soft clams and oysters,” and bottom is very actively in use by full-time lobstermen and commercial shell fishermen in addition to the recreational fisheries associated with the coastline. The habitat above the substrate and out-of-water is equally rich, including essential fish habitat (“EFH”), feeding grounds for waterfowl, including migratory duck species and seal haul-outs.

not the intention of the agency to “fundamentally change or ‘weaken’ the consistency requirement.” 65 Fed. Reg. 77124.

³⁵ Connecticut CMP at II-6 and Fig. 3 (the Thimble Islands area is within “Segment D”).

See *Attachments, Item No. 16*. (habitat diversity data). The Connecticut Siting Council characterized the habitat of this area as follows:

An important benthic community type in the vicinity of the proposed off-shore pipeline route is the rocky subtidal habitat because of the diversity of marine plants and animals it supports. The majority of this type of hard substrate habitat generally occurs within approximately 2.5 miles of the Connecticut shoreline in the vicinity of the Thimble Islands. The rocky areas around the Thimble Islands support the attachment of algae and provide a habitat for foraging fish, crabs, urchins, snails, sponges, mussels, oysters, scallops, and numerous other organisms. Harbor seals³⁶ are found around the Thimble Islands during the winter months.

CSC Finding No. 148 (August 1, 2002).

The geological and natural diversity uniqueness of this area was, the agency observed, acknowledged by the federal government's Fish and Wildlife Service as a "significant habitat complex in need of protection," in the *Northeast Coastal Areas Study: Significant Coastal Habitats of Southern New England and Portions of Long Island, New York* (August, 1991). The introduction to the Fish and Wildlife Service's report indicated that while the natural resources of these estuarine areas were significant, they had also suffered greatly from human activities:

The extinction and extirpation of several species of plants and animals in this area and population declines in others, and consequent biological diminution of the region, can be attributed to many factors, but most prominent are the destruction of natural habitats through dredging, filling, ditching, and draining of wetlands, highway and building construction, and pollution of sediments and waters by environmental contaminants such as chlorinated hydrocarbons, heavy metals, nutrients associated with various human activities and oil.

³⁶ The Connecticut Siting Council found that Harbor seals are one of the mammalian species protected by the Mammal Protection Act of 1972, which legislation established a moratorium that prohibits disturbance of these animals. The Council found that Harbor seals occurred regularly within the proposed project corridor, and could be affected by the proposed project. CSC Finding No. 158 (August 1, 2002).

Id. at “Introduction and Map.” These somber assessments were, however, made in the brighter context of Congress’ recognition of the ecological importance of the Northeast coast, and the desirability of identifying “those areas in southern New England and Long Island in need of protection for fish and wildlife habitat and the preservation of natural diversity.” *Id.* Islander East’s own expert, Dr. Bohlen, has acknowledged that the Thimble Islands area resources are comprised of “both the commercial fishery and the recreational aspects of the area, the view vista, and the diversity of the habitat, *it’s a very sensitive area . . .*” CSC Testimony (April 16, 2002) at 34 (emphasis added).³⁷

In total disregard of these observations, Islander East claims that its proposed project *avoids the Thimble Islands entirely*, and the company has included a map of the nearshore waters of this reach of Connecticut’s coast. The truth is that, from a habitat and geological perspective, the pipeline clearly slices through the area in question. While the geographical place names associated with the larger bedrock outcroppings to the immediate East are identified as “the Thimble Islands,” the geophysical features of the Thimble Island complex include *all of the rock outcroppings and reefs in the area*, including Bowman Rock, White Top Rock, Pork Rocks, Hookers Rock and Middle Rocks. *See, e.g.,* I.E. Supp. Bf. Map, Natural Resource Group “Islander East Pipeline Project, Thimble Islands” (rev’d 8/13/03). To consider, as one must, the coastal features germane to a project of this sort is of necessity to consider islands and associated subtidal features. That inquiry cannot be arbitrarily “segmented” out by choosing a pipeline corridor that avoids only the most prominent features of the topography.

The CZMA's declaration of policy fully supports of the identification, conservation and preservation of unique resources such as the Thimble Islands complex. 16 U.S.C. § 1452(1) ("preserve, protect . . . the resources of the Nation's coastal zone . . ."), (2) ("encourage and assist the states . . . to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological . . . values . . ."). The DEP's coastal consistency review and supporting materials show that it has discharged this congressional mandate and the specific requirements of its own CMP. The appendices following both the agency's October 15, 2002 and July 29, 2003 objection letters detail the enforceable policies implicated in its CZMA consistency review. *See* DEP Consistency Objection (July 29, 2003) at App. D. At bottom, the proposed project simply does not pass muster under the Connecticut CMP and it was properly rejected as utterly inconsistent with sound management of the coastal zone.

b. Other Agency Commentary:

In previous consistency decisions respecting this element two inquiry, the Secretary has accorded "significance" to the negative comments or objections of federal agencies directed at the proposed project. *See, e.g., Appeal of Mobil Exploration & Producing U.S., Inc.* at 23-24 (accorded particular significance to the views of the Fish and Wildlife Service and National Marine Fisheries Service as bearing upon coastal resource issues); *Appeal of A. Elwood Chestnut* (November 4, 1992) at 7 (accorded significance to the views of three resource management agencies on identified available alternative).

On September 5, 2003, the EPA appended further comments to its prior submissions to the ACOE regarding the latter's pending consideration of Islander East's application for a

³⁷ Dr. Stewart opined that the area was worthy of consideration as a marine sanctuary. CSC Testimony

license pursuant to Section 10 of the Rivers and Harbors Act of 1988 and Section 404 of the Clean Water Act (July 1, 2002). EPA had also submitted comments to the FERC on May 21 2002, in response to the filing of the FERC's DEIS, and on September 30, 2002 in response to the filing of the FEIS by the FERC. The EPA was, at that time, critical of the conclusions of the FERC environmental review staff, and, in respect to this latest round of comment, the EPA has addressed the sufficiency of Islander East's submissions. EPA's latest comments explicitly take into account Islander East's latest revisions to its proposed construction and installation plan for an approximately one-mile segment of the alignment commencing at the exit hole for the HDD drill-out in nearshore waters. The EPA states as follows:

In summary, we recognize that the applicant has recently proposed construction techniques to minimize project impacts from its preferred alternative, although we would expect such techniques to be employed for all alternatives. *However, the applicant still has not demonstrated that the modified preferred alternative represents the least environmentally damaging practicable alternative.*

U.S.-EPA Correspondence to C. Godfrey, ACOE, New England Division (September 5, 2003) (emphasis added). The EPA concluded that Islander East's project as proposed "has failed to satisfy the § 404(b)(1) guidelines [of the U.S.-EPA] and it does not qualify for § 404 permit issuance."³⁸ The EPA also noted that, while Connecticut DEP's coastal consistency objection and its tentative determination to deny a Section 401 water quality certification did not in and of themselves compel a negative determination on the Section 404 permit, these determinations

(April 12, 2002) at 254.

³⁸ If the proposed project fails the standard contained in the Section 404 guidelines, that is, if it is determined that the proposed project causes or contributes to significant degradation of the waters of the United States under 40 C.F.R. § 230.10(c), no Section 404 permit may issue. 33 U.S.C. § 1251(a).

nevertheless “*highlight the substantial impact associated with the preferred alignment and the importance of the resources impacted.*” *Id.*

The National Marine Fisheries Service (“NMFS”) has commented on Islander East’s project, and its observations are also pointedly negative. Memorandum, William T. Holgarth, Ph.D. to Brandon [sic] Blum, Office of General Counsel for Ocean Services (NOAA) (June 4, 2003). *Attachments, Item No. 17*. Even if, as Islander East would argue, it has altered its proposed treatment of sidecasting sediments created by the pipe-burying operation, the comments of NMFS would still work against the project. The Service did not object solely to the sediment sidecasting. It also objected to the proposed anchor pits (some seventy placements per kilometer) and depressions associated with the barge mooring and positioning that will attend the trenching and laying of the pipe (“pipe laying and multiple pass, plowing, and backfill programs”). These are construction-related effects that will create fluidized sediment issues quite apart from the earlier proposed sidecasting process. These effects will be most precarious in the deeper waters (> 7 meters) where the sensitivity of the substrate and benthic environments to disturbance may be greater.³⁹ NMFS objected to the subtidal discharge of drilling mud in shallower nearshore waters (< 7 meters). The predicted negative effects to be visited upon the benthic community remain, and they are significant: hypoxic or anoxic pits that will act as traps “incapable of supporting benthic organisms”; unstable sediments upon which mollusks will grow

³⁹ See also Testimony of Dr. L. Stewart, CSC hearing, April 12, 2002, at 246. (“As you get into deeper water environments, I suspect that they tend to be more stable and not as prone to experiencing sediment disturbance[,] because the wind forces and tidal forces just don’t make it there. . . . If deep water animals are able to adapt or if they’re more susceptible to a sediment disturbance because of a mechanical intrusion as opposed to on-shore[,] the mechanical intrusion may somewhat be . . . equivalent to major large storms.”)

and into which these animals will sink and suffocate as their adult weight causes them to exceed the ability of the loose substrate to support them on its surface; interference with feeding efficiencies by “near bottom turbidity” that will have an associated negative impact upon spawning and hatching success. NMFS Comments (June 4, 2003) at 2-4.

The Connecticut Siting Council’s findings offer a succinct catalogue of the adverse impacts upon the benthic community associated with the pipe laying operation in Long Island Sound:

Direct and indirect affects on marine organisms resulting from anchor and cable arrays, trench excavation, and pipe installation would include the physical disturbance of bottom habitats; increased water column turbidity in the vicinity of the proposed pipeline; reduced respiratory efficiency from the dispersion of excavated sediments; locally increased chemical and sediment oxygen demand; the temporary displacement of mobile organisms away from the proposed construction areas; and increased mortality of stressed or immobile organisms. High concentration of suspended sediments has the potential to impact benthic communities adjacent to the proposed construction area. The impact of a release of HDD fluid on the benthic community would depend on the amount of drilling fluid released, the area and thickness of deposition, and the organisms’ physiological response to the drilling fluid.

CSC Finding No. 159 (August 1, 2002).

Even if all aspects of Islander East’s revised plans for effecting the burying of the pipeline in the Sound were to be successful, such “mitigation” would not avoid the destruction of the shallow benthic habitat. Strategies for replacing the material dredged out of the pipe trenches with material other than backfilled, fluidized sediments does *not* return the bottom to any approximation to its former, undisturbed state. The original characteristics, functions and values associated with the impacted area cannot be fully restored. *See* at section 2, *infra*. Mitigation

measures that do not foster the avoidance of impact cannot transform habitat destruction into acceptable activity.

2. ***Shellfish Impacts Will Have Long-Term, Negative Consequences To A Nationally Important, Water-Dependent And Coastal-Dependent Use***

One of the most serious threats posed by Islander East's project in the vicinity of the Thimble Islands is that to shellfishing and shellfisheries. Commercial shellfishing remains a vital aspect of Connecticut's coastal zone region. Over 67,000 acres of oysters are cultivated in Connecticut's coastal waters. Connecticut ranks first in the nation in the dollar value of the oysters that it harvests.⁴⁰ It is a multi-million dollar industry, now making a recovery after a major disease related die-off in the late 1990s (\$45,000,000 and 893,964 bushels were harvested in 1992, for example). The hard clam market share of the state is also impressive; it, too, is a multi-million dollar industry, though oysters are more profitable. *See Attachments, Item No. 18.* Shellfishing in the Stony Creek and Thimble Islands area, along with the nearby towns of Madison and Guilford, has a venerable history. The Stony Creek and Thimble Islands beds were said to produce native oysters of extra quality, an appreciation documented as far back as the 1880s. The Thimble Islands area's abundance likewise provided oyster seed for export to shellfisheries beyond Connecticut waters.⁴¹ The cultivation of deeper (from twenty-five to forty feet), non-shoal waters, historically and currently, was and is responsible for the profitability of this industry. Historically, and presently, the location of this shellfishery is an exception to the

⁴⁰ On the East Coast of the United States, in calendar year 2001, Connecticut ranked first and second, respectively, in the harvesting of hard clams and oysters as measured in metric tons. *See Table, Attachments, Item No. 19* (source: State of Connecticut Department of Agriculture, Bureau of Aquaculture). Connecticut ranks sixth in the entire United States for oyster production.

observation that the greatest extent of shellfishing abundance is to be found in the western reaches of Long Island Sound. *See* CSC Testimony of L. Williams (April 17, 2002) at 102-103. The environmental consequences of dense development in those western reaches—sewage, industrial discharges and surficial runoff—and their inevitably negative impact upon shellfisheries only serve to highlight the importance of preserving an area that is pristine enough to cultivate these organisms for direct consumption and serve as depuration grounds for transferred stock. *See* DEP Consistency Correspondence (July 29, 2003); Connecticut Dept. of Agriculture Bureau of Aquaculture maps, *Attachments, Item No. 20*.

The HDD technology is proposed as an alternative to trenching through only some of the shellfish grounds in the nearshore waters of the Stony Creek and Thimble Islands area. The feasibility of the technology for this proposed project is limited: it must break through the seafloor in the middle of the area that is prime habitat for shellfisheries. The HDD method has inherent limits on its ability to cross long distances. The practicable extent, estimated at between 4,000 and 6,000 feet is dependent upon the nature and dimensions of the “pipe” proposed, and its success depends upon the variable natural conditions encountered in the strata profile.⁴²

Although Islander East states that HDD will avoid the town of Branford’s presently leased beds,

⁴¹ T. Andersen, *This Fine Piece of Water: An Environmental History Of Long Island Sound*, 93 (2002). Connecticut seed oysters “consistently set well,” and constituted the bulk of the seed transplanted throughout the New York and New England region. *Id.* at 90.

⁴² *See, e.g.*, Task Force on Long Island Sound, *Comprehensive Assessment and Report*, Part II, at 92 (June 3, 2003). The report notes that “[i]nstallations through profiles with diverse geologic strata are difficult and may require re-tooling the drilling and reaming heads to accommodate the varying formations. Gravel lenses, cobble, or boulders within the profile strata represent the most adverse geologic condition for HDD installations, and consequently, the HDD technique is typically *not a feasible alternative* in this type of strata.” *Id.* (Emphasis added.) There exists *no* detailed subsurface data analysis for the proposed Islander East HDD corridor. *Attachments, Item No. 21*. DEP Consistency Objection (July 29, 2003) at 5.

the break-out area is nevertheless *totally within a much larger area that is eminently suitable for the cultivation of shellfish*. The state's Department of Agriculture has reiterated this point to the DEP and ACOE. *See* Maps, *supra*; Memorandum, John H. Volk, Bureau Director, CT-DOA to Susan Jacobson, CT-DEP (October 4, 2003); Letter, John H. Volk, Bureau Director, CT-DOA to Cori M. Rose, U.S. Army Corps of Engineers, New England Dist. (May 28, 2002). *Attachment Item Nos. 22, 23*. The commercial shellfish industry gave testimony to the Connecticut Siting Council to the same effect. CSC Testimony of L. Williams (April 17, 2002) at 99-101.

The HDD proposed by Islander East cannot “skip over” the shellfisheries and shellfishing areas in the path of the alignment. Taking into account all of the reservations expressed about the bentonite releases and the necessity of creating a major, football field-sized exit pit to receive the drill-out (which in and of itself is a major insult to bottom suitable for shellfisheries), the technology fails, because it cannot be sustained far enough out into deeper waters so as to avoid the area's most acute environmental impacts posed by the project. *See, e.g.*, CSC Testimony L. Williams (April 17, 2002) at 129; CSC Testimony of Dr. L. Stewart (April 12, 2002) at 250.⁴³ Dr. Stewart stated that, engineering constraints aside, the directional drilling would have to go more than twice the projected distance, in order to bypass the shellfish habitat areas and alleviate the potential adverse effects of bentonite release in the shallower, “very transportable depth regime.” *Id.* at 250. *See also* DEP Consistency Objection (July 29, 2003) at 5. (Since the geological profile of the Thimble Islands is complex, exhibiting a high concentration of

⁴³ When asked “How far out would be adequate?,” Dr. Stewart answered that the drilling would have to be “out of that complex of containment of Thimble Islands, containment circulation patterns, redistribution concentrations of sediment, it would be out of that really unique multiple habitat complex.” CSC Testimony (April 12, 2002) at 251-52.

geological features in a small area, the likelihood of frac-outs in transitional strata is greater than normal.) Islander East concedes that release of drilling fluid “would likely occur at the HDD exit point, where the HDD exit area will be excavated,” I.E. Supp. Bf. at 36, but its conclusion that no “impacts” to shellfish beds are expected is unsupported.

Dr. Stewart observed that it is not accurate to focus solely upon currently licensed commercial beds, because the real issue is the ability of nearby areas—some of which may have formerly been in production—to return to production with advances in the re-growth of this historic commercial fishery. CSC Hearing Testimony (April 12, 2002) at 179, 249-50; *see also* Testimony of L. Williams, *supra*. Moreover, the town of Branford has itself moved in recent years to expand its oversight and regulation of shellfishing areas within the town’s jurisdiction, relying upon 1998 changes in its shellfish ordinance. *See* Branford Shellfish Commission Annual Report 1997-1998, *Attachments, Item No. 24*. This mapping of new shellfish lease areas completely surrounds the farthest reach of the HDD proposal of Islander East. *See* map, Town of Branford, “Map of Privately Owned Shellfish Beds, Eastern Division” (March 1, 1968) with additional, undesignated lease areas depicted (1998); “2002 Branford Shellfish Bed Boundaries”, Brodie Group GIS Consultants (same). *Attachments, Item Nos. 25, 26*. Beyond the state jurisdiction line depicted on the Branford maps, state beds also exist, areas that have been in service since at least the beginning of the last century.⁴⁴ *See* Map, “Section of Long Island

⁴⁴ Islander East points out in the appendix to its supplemental brief that it has specifically addressed the concerns of certain commercial shellfishermen in agreements concluded with the company. Islander East reached such an agreement with Branford River Lobster, LLC in April, 2002. *Attachments, Item No. 28*. The agreement includes a one-time payment of nearly two million dollars in exchange for a release from Branford River Lobster for any cause of action or claim relating to permanent damage occasioned by the pipeline construction should Islander proceed with the project. Needless to say, none

Sound Oyster Grounds,” in *Annual Report of the State Shell Fish Commission* (1901), *Attachments, Item No. 27*; DEP Consistency Objection (July 29, 2003) at App. E. The length from the end of the trenched portion of the pipe laying, at MP 12, to the farthest depth useful for any aspect of commercial shellfishing (~ 50 feet), that is, at MP 15, is approximately four miles (one mile of trenched pipe plus three miles of plowing). This area will also suffer the negative impacts associated with the dispersal of sediment over undisturbed substrate. The Connecticut Bureau of Aquaculture continues to regard the potential disruption from project siting and construction methods as significant and adverse.⁴⁵ Studies prepared for the town of Branford support the conclusion that sedimentation impacts will be more widespread than estimated by Islander East. *See*, The Garrett Group, Ltd., “Preliminary Report on the Anticipated Biological Impacts Associated with the Proposed Islander East Pipeline Project, through the Nearshore Area of Long Island Sound Branford, CT,” at ES-2, 15-16 (May 8, 2003); John C. Roberge, P.E., “Potential Sedimentation Impacts which could result from Dredging, MP 10.9 – MP 12.0 Proposed Construction of the Islander East Gas Pipeline,” at ES-1, 9-11 (May 5, 2003); Correspondence, John C. Roberge, P.E., to Anthony J. DaRos (September 30, 2003). These materials emphasize that even a very thin layer of sediment cover attributable to dredging can be harmful to these animals. *Attachments, Item Nos. 30, 31*. Therefore, the assertion that no harm

of this ameliorates the damage to other lease holder interests (town or state), or affects the nature of the coastal consistency review process. The agreement is a tacit acknowledgement by Islander East that its project if completed will have a permanent negative impact upon the shellfishery.

⁴⁵ Correspondence of John H. Volk, CT-DOA, *supra*. David H. Carey, Director, Connecticut Department of Agriculture, Bureau of Aquaculture, to Susan Jacobson, DEP-Office of Long Island Sound Programs (October 2, 2003) with attached memorandum, Dr. Inke Sunila, Shellfish Pathologist, Bureau of Aquaculture, to David H. Carey (October 1, 2003). *Attachments, Item No. 29*.

will be attributable to “designated” shellfish bed is inaccurate and not in accord with the fundamentals of sound resource management.

The impacts of pipe laying relate not only to the shellfishery, but to shellfishing. The DEP concluded based upon the revised installation plan of the company, utilizing bank-run gravel and sand as a substitute for sidecast backfilling, that 5.5 acres of nearshore bottom habitat would be permanently altered and rendered unsuitable for commercial shellfishing, because the cobble would interfere with harvesting techniques. *See also* Letter, David H. Carey, Director, Statement of Connecticut Department of Agriculture Bureau of Aquaculture (September 28, 2003) and attachments. *Attachments, Item No. 32*. Mr. Williams testified in detail before the Connecticut Siting Council of the problems presented by post-construction attempts to manipulate the bottom contours, and also the impediments to cultivation and harvesting posed by the multiple anchor strikes caused by the pipe laying construction. Testimony of L. Williams (April 17, 2002) at 92-93, 98, 107-109, 118, 128. Moreover, the DEP concluded that the impacts to commercial shellfishing would extend “well beyond” the 5 acres of disturbance, because “[w]hile the cobble-filled trench would be 37’ wide, the area that the commercial harvesting equipment would need to avoid would be much wider because of the required turning radius.” The entire aggregate of impacts caused by Islander East over the 3,700-acre area of pipe laying caused by backfill with gravel, plow utilization, anchor strikes and cable sweeps will negatively affect commercial shellfishing.⁴⁶ In addition, it is unlikely that a post-construction “adjusted”

⁴⁶ Islander East’s insinuation that DEP came late to the issue of off-shore impacts, I.E. Supp. Bf. at 6 n. 11, is irrelevant, and the accusation that the agency has “substantially misused” technical data is unfounded. The applicant has not referenced published studies which support the conclusion that

finished substrate contour of +2' to -1' is achievable. DEP Coastal Consistency Objection (July 29, 2003) at 7 and App. A ("Application Modifications" comparison chart). Thus, excavations, any frac-outs and trenching all would have an obvious and persistent negative environmental impact *anywhere* in this area.

Lobstering is also not immune to the impacts associated with the HDD aspects of Islander East's proposed project. The Connecticut Siting Council received information that led it to find that any increases in suspended sediments associated with the pipe laying operation and other related in-water construction activities beyond "the immediate vicinity of the proposed pipeline trench" would not adversely affect adult lobsters, since these creatures are mobile "and occur in naturally turbid areas." The same finding, however, states that "the effects of suspended sediments and the release of HDD fluid in Long Island Sound may adversely affect larval lobsters." CSC Finding No. 160.

Testimony before the Connecticut Siting Council had additional concerns about this fishery's ability to withstand additional stress to its environment. The anchor pits and related after-effects upon the sediment topography, along with chemical accumulation, hypoxic or anoxic pits, entrainment of micro-organisms and impediments to the flow of materials in the water column all pose threats to the adult population notwithstanding their mobility, because the pipeline's general orientation from north to south across a prime area of species migration, which is along the other coordinates, east and west.⁴⁷

pipeline installations have no permanent adverse effects on shellfishing. *But see*, Testimony of L. Williams, CSC Hearings, *supra*.

⁴⁷ Testimony of Dr. L. Stewart, CSC, April 12, 2002, at 188-90, 198-99, 235. Dr. Stewart also discussed these issues as bearing upon fisheries that are regulated by and through the Magnuson-Stevens Fishery

3. ***Other Impacts And Claims Of Islander East After Remand Confirm That The National Interest Advanced Does Not Outweigh The Adverse Environmental Impacts of the Proposed Project***

Islander East's supplemental briefing after remand in this appeal is a minutely detailed presentation of fine distinctions that seeks to distract the Secretary from the basic nature of the proposed undertaking. The adverse impacts associated with the project continue to pose insurmountable obstacles to certification for coastal consistency, as affirmed by the DEP in its July 29, 2003 determination. The following examples suffice to make this point:

- Islander East submits that it will be reducing the overall area of seabed disturbance resulting from the pipeline's construction by approximately 125 acres, correlating to a 90 percent reduction as compared with the original application.

*The most recent modifications will result in approximately 14 acres of disturbance for only one (1) mile of the pipeline. The 90 percent reduction is solely for this one mile section of trenching. Pipeline installation, however, will have an impact upon another 3,700 acres of bottom habitat over the remaining 9 miles of the corridor in Connecticut waters.*⁴⁸

- Islander East claims that clamshell dredging in conjunction with its revised plan for the one-mile segment from the HDD break-out point to the plowed portion of the pipe laying will avoid seafloor disturbance and sedimentation due to sidecasting of dredged material.

Sidecasting notwithstanding, the clamshell dredging operation will cause sedimentation disturbance and dispersal where it would otherwise not naturally occur; removal of sidecasting sediment reduces, but by no means eliminates the adverse impacts associated with sediment dispersal. Modeling

Conservation and Management Act. 16 U.S.C. § 1801 *et seq.* He said that it was a requirement that one examine essential fish habitat and the impacts thereon. This concern is reflected the NMFS comments on Islander East's proposed project. NMFS stated that the pipeline installation would adversely affect fisheries species and habitats managed under the aforementioned federal legislation. One of NMFS' observations was that project-induced impacts to the sediment would adversely affect habitat. NMFS CZMA Comments of William T. Hogarth, Ph.D. (June 4, 2003) at 3-4.

⁴⁸ DEP Coastal Consistency Denial (July 29, 2003).

*studies have shown that, under ideal conditions with no storm events, sedimentation of up to 3 millimeters is expected.*⁴⁹

- Islander East claims that reduction in the burial depth of the pipe in the one-mile segment, along with the concomitant reduction in barge passes and anchor strikes and cable sweeps, constitutes an “enhancement” over its prior proposal.

*The claim is predicated upon the success of the construction methodology. In respect to these sorts of impacts, for example, Cross Sound Cable, which was proposing the installation of a much smaller component than a 24” pipe, was forced to undertake more, not fewer, passes in order to lay its cable to the requisite depth, and even then it was not entirely successful.*⁵⁰

Islander East claims that the DEP has simply ignored the “no burial” conclusions of one of the company’s experts, Roman Zajac, respecting sedimentation impacts.

*The DEP has not ignored Dr. Zajac’s opinion, at least insofar as Islander East characterizes it, but, rather, disagrees with the statement. Juvenile and developing habitat are susceptible to smothering and stress.*⁵¹

- Islander East claims that there is minimal impact associated with suspended sediment in the water column resulting from its pipeline installation.

References from Dr. Bohlen’s Final Report⁵² have been taken out of context to lessen the severity of the impacts associated with sedimentation created by pipeline installation. The material quoted from Bohlen’s study in the DEP’s July 29, 2003 coastal consistency objection, “Suspended sediment in the water column remained elevated during the four days including and just after the storm event with a mass approximately 65% higher than that suspended during normal dredging operations”, is still applicable to the proposed pipeline installation, even with the proposed modifications in the one mile section. In the same paragraph of his report, Bohlen asserts that “[s]torm

⁴⁹ See n. 52, *infra*.

⁵⁰ E-mail correspondence from Peter Francis, CT-DEP, to Betsey Wingfield, CT-DEP (May 29, 2002), reporting on Cross-Sound Cable’s additional, unplanned passes over the alignment in an attempt to bring its cable to depth. *Attachments, Item No. 33*.

⁵¹ See Garrett Group Report at ES-2, 15-16; CT-DOA Memoranda (Carey, Sunila).

⁵² F. Bohlen, “An investigation of sedimentation induced by gas pipeline laying operations in the vicinity of the oyster bed lease areas, Milford, Connecticut,” Final Report (March 17, 1992). I.E. App. Vol. 5 Item No. 8.

*associated resuspension is expected to affect the entire nearshore area out to water depths beyond the influence of surface waves (approximately 30 to 60ft).” Since sediment mounding in association with the plow will occur along approximately 9 miles of the proposed pipeline, Bohlen’s research is relevant and applicable to this discussion. The partial quote cited by Islander, “pipeline placement produced no measurable variation in suspended material concentration with values remaining equal to or less than those observed during the pre-project period” is irrelevant to the discussion of storm-induced sedimentation as is clearly shown on Figures 21 and 25. Thus, in spite of the reduction of sediment mounding in a one-mile segment of the installation route, there will still be significant adverse impacts on water quality through sediment suspension and upon benthic organisms and their habitat as a result of the 9 miles of plowing with subsequent mounding of backfill material, and the dredging of approximately 24,000 to 30,000 cubic yards of sediment and its backfilling. As noted in the October 15, 2002 coastal consistency objection, a severe storm in March, 1991 partially filled an open trench and dispersed sediment up to 3,280 feet during the installation of the Iroquois pipeline off the coast in Milford, Connecticut. Since work would be conducted in the fall and winter when less than ideal conditions are common, these models have limited application.⁵³ Additionally, the offshore studies conducted relate to **existing** conditions and have absolutely no relevance to Islander’s determination that impacts will be short term and temporary.*

Islander East focuses its comments throughout about impacts upon the trenched or plowed portions of the proposed alignment in terms of discussing “disturbance.”

The alignment corridor, composed not only of the trenched area, but also the plowed area and its associated anchor strikes and cable sweeps, constitutes a swath of impact more than 1,200 feet to 2,000 feet on each side of the lay barge.

Islander East has asserted that its HDD Monitoring and Operations Plan proves that there is no adverse impact associated with the use of this technology at this location.

The HDD plan referred to cannot logically prove no impact to environmental resources; it is, at best, a protocol for meeting exigent circumstances that may

⁵³ Memorandum (October 1, 2003) Doug Glowacki, State of Connecticut DEP to Susan Jacobson; cf. Balcom, “Sea ‘farmers’ Eligible for Relief,” *Connecticut Post* (January 10, 1993) (regarding effects of winter storms in Long Island Sound.) *Attachments, Item No. 34.*

*be encountered during the course of employing the technology. It does not in any way demonstrate for the purposes of regulatory approval of the proposal that no adverse impacts are associated with it. Islander East has not submitted subgeological surveys needed to demonstrate no adverse impact.*⁵⁴

Islander East claims that DEP ignored its site-specific tidal wetland restoration plan in reaching its conclusions regarding unacceptable impacts from the pipe laying operation. Islander East claims further that these wetlands are of poor quality.

If an area meets the definition of formerly connected, and has not be converted to some other healthy functioning ecosystem, and restoration (to tidal wetland) is feasible, then DEP is required to regulate the 'formerly connected' area as a tidal wetland and apply the tidal wetland policy of its CMP which requires preservation. Nowhere in the tidal wetland act are there exceptions to the requirement for preservation and so habitat quality is not a consideration for whether a permit should issue. See Conn. Gen. Stat. § 22a-29; Conn. Gen. Stat. § 22a-92(b)(2)(E).

C. Alternative Configurations Of The Proposed Project Are Available Whose Impacts Would Be Consistent With The Enforceable Policies Of Connecticut's Coastal Management Program

The State of Connecticut's July 29, 2003 coastal consistency objection discussion of alternatives specifically identified an available alternative that was likely consistent with the enforceable policies contained in the state's CMP, and perfected the required notice to the applicant, including the right to appeal, all as required by the CZMA and the implementing regulations (15 C.F.R. § 930.63(e). DEP Consistency Letters, October 15, 2002 and July 29, 2003. The objection of the state coastal management review authority was, accordingly, properly lodged. *See, e.g., Appeal of Chestnut* at 4.

⁵⁴ Letter from Gene H. Muhlherr, Islander East Pipeline Co. to Charles H. Evans (May 27, 2003), with Attachment 14 (HDD Failure). *Attachments, Item No. 14, supra.*

1 *The Secretary's Review Standard For Assessing Available Alternatives*

The Secretary must find that there is no reasonable alternative to the proposed project in order for him to conclude that the state's coastal consistency review determination should be overridden. 15 C.F.R. § 930.121(c). If the state has identified an alternative that is available and consistent with the enforceable policies of its CMP, the Secretary will accord weight to that determination for the purposes of this element of the consistency appeal review. *See, e.g., Appeal of Yeomans Hall Club* (August 1, 1992) at 5; *see also Appeal of Chestnut, supra*, at 5.

Islander East, in order to prevail on this third element, must bear the evidentiary burden of demonstrating that the designated alternative is unreasonable or unavailable. *Id.* The Secretary has recognized that a state may be able to describe only the probable consistency of an alternative or lack of same, pending a final determination when the applicant submits the alternative to it. *Id.* Under Ground I precedent, the identification of a reasonable and available alternative by a state compels the Secretary to end the inquiry and dismiss the appeal. *Appeal of Chestnut* at 5.

The state is required to describe the alternative with sufficient specificity that the alternative can be conducted in a manner consistent with its CMP. *Appeal of Korea Drilling Co., Ltd.* (January 19, 1989) at 24. More is not required in order to direct the analysis to this point on appeal, except to note that: 1) a technically infeasible project, defined by the Secretary as “a project for which technology and/or resources do not exist,” is deemed “unavailable”; and 2) that unavailability can mean that the alternative proposed by the state coastal consistency review authority will not allow the project to achieve its “primary purpose(s).” *Appeal of Yeomans Hall Club* at 5; *cf. Appeal of Chestnut, supra*, at 3. As in respect to the evaluation of adverse

environmental impacts, the Secretary accords considerable weight to the views of natural resource agencies. *See, e.g., id.* at 7.

When the Secretary examines alternatives under element three, he focuses upon a project's primary purpose and whether that can be obtained if the alternative is implemented. He does not allow his inquiry to be influenced by so-called secondary purposes or the benefits, including site specific ones, that a project may obtain, consideration of which "would likely make site alternatives for all projects unavailable." *Appeal of Yeomans Hall Club, supra*, at 6. Accordingly, the Secretary will limit his inquiry respecting availability to whether "essential or primary purpose(s) can be obtained if the alternative is implemented." *Id.*

The Secretary's examination of whether an alternative identified by the state that filed a consistency objection is "reasonable" turns on matters of economic feasibility. The Secretary weighs the increased costs of the alternative against its environmental advantages. This requires a two-factor analysis: 1) consideration of the increased costs to the appellant of carrying out the proposed project in a manner consistent with the state's CMP; and 2) the environmental benefits of saving the environmental resources proposed to be negatively affected. *Id.*; *see also Appeal of Chestnut* at 7. The Secretary has looked at the economics of the proposed alternative from the perspective of what is "economically prohibitive." *Id.* at 11. Finally, the Secretary's examination of "environmental gain" from looking to the proposed alternative has heavily relied upon official comment respecting the impacts associated with the proposed project.

2. *The ELI Extension Alternative*

The Department has reviewed the ELI System Alternative and deemed the impacts associated with the installation of a new pipeline to be tapped into an existing 24" diameter pipe

located off the Milford shore in water approximately 30' deep to be consistent with Connecticut's CMP. The Department acknowledges that there will be adverse impacts associated with another pipeline installed off the Milford shore. These impacts in this location are acceptable. The adverse impacts associated with a new pipeline installed through the center of the diverse Thimble Islands complex in contrast are not acceptable and are inconsistent with the CZMP. The DEP's July 29, 2003 coastal consistency objection reiterated the agency's assessment that the so-called ELI Extension was in fact a preferable alternative to the Islander East project proposal, because the overall environmental impact would be less, a conclusion to which the FERC environmental review staff also came. FERC FEIS (August, 2002) at Section 4.2.1 and 5.55.

The state has discharged its burden under this element of identifying the alternative with specificity. The ELI Extension is more than sufficiently detailed in the draft EIS that the FERC's NEPA review staff produced in August, 2002. (No FEIS was prepared owing to Iroquois' withdrawal of the application from further consideration in early 2003.) See *Attachments, Item No. 36*. DEP concurred with the FERC environmental review staff's conclusion that the ELI Extension would "reduce[] onshore and offshore impacts, except for

⁵⁵ The FERC FEIS Section 5 conclusion states: "We have determined that one of these system alternatives, the ELI System Alternative, is environmentally preferable because it has a shorter Long Island Sound crossing, avoids more shellfish leases, and would only have air quality and noise impacts onshore in Connecticut. The impacts on Long Island would be identical to the Islander East Project." *Id.* at 5-11.

emissions.” FEIS at 4-6; see DEP Correspondence (July 29, 2003) at 9. This alternative “route” and not the Iroquois “proposal” was the issue before the DEP.⁵⁶

For the purposes of CZMA review, the DEP concluded that this alternative constituted an “available option.” It is technically feasible, and it will allow Islander East to achieve its primary purpose of transmitting natural gas to Long Island. As compared with the Islander East proposal, the ELI Extension alternative would meet the DEP approval criterion of an available alternative that combines both “the least invasive construction techniques with the most appropriate siting of the facility.” *Id.* The following reasons support this conclusion:

- ELI removes the proposed alignment from a geological and ecological micro-environment characterized by the collection of islets and great diversity of habitat, an area unique to the reach of coast over which Connecticut exercises coastal resource management jurisdiction.

ELI would allow for the installation of the tap for the extension far nearer deep water than the Islander East preferred alternative.

- ELI would obviate the need for use of the HDD technology and the associated damage to the bottom occasioned by the excavation of a large exit-hole receiving area, and would eliminate the need to manage polluting bentonite drilling fluids; finally, it would eliminate the possibility of frac-out should the drilling as proposed meet unsuitable profile strata.⁵⁷
- The stratum profile associated with ELI is more uniform than that in the Thimble Islands area, where the very existence of the island complex is proof of greater complexity associated with the proximity of crystalline bedrock at or near the surface. There are

⁵⁶ Consequently, for the present inquiry, the proposal is not “hypothetical” as asserted by the FERC. See FERC Order, *supra*, (January 17, 2003) at ¶ 60.

⁵⁷ Dr. Stewart noted that a preferred alternative to the route chosen by Islander East would have been through an area that was “homogenous and relatively free of bedrock[.]” CSC Testimony (April 12, 2002) at 255. The ELI Extension area meets that criterion.

fewer uncertainties associated with the strata profile during the pipe laying construction work.⁵⁸

- ELI would take advantage of an existing utility corridor for a portion of its length.

The earlier achievement of deep water (> 50 ft.)—water unsuitable for shellfish cultivation and shellfishing—spares adverse impacts to an important commercial, recreational, cultural and historically coastal and existing water dependent uses.⁵⁹

- ELI open cuts six times fewer shellfish lease areas than does Islander East (936 feet versus 6,141 feet).
- ELI eliminates 3.5 miles of pipe laying in Connecticut waters.
- ELI eliminates the adverse tidal wetlands impacts associated with Islander East's preferred alternative.

The comments filed by natural resources management agencies are in accord with the conclusion to which the DEP has come. The FWS's June 4, 2003 comment letter specifically identifies the ELI Extension proposal as:

hav[ing] significantly fewer and smaller individual and cumulative impacts associated with their design than those found in the Islander East proposal. Further, the State of Connecticut has authorized the placement of utility structures in their [sic] coastal zone, indicating that some proposals can comply with the Connecticut Coastal Zone Policies. . . NOAA Fisheries has recommended that the appellant employ such alternative alignments and identified less destructive installation methodologies that would reduce further local and regional adverse impacts. Selection of an alignment with fewer shellfish resources . . . would greatly reduce the adverse impacts associated with the Islander East proposal.

⁵⁸ See Report Submitted with the Application of Site-Specific Regulation of the Connecticut Portion of the Iroquois Natural Gas Transmission Pipeline, at IV-64 (no bedrock outcrops along the route and no known occurrences of boulders in the offshore areas).I.E. Vol. 5, Item 8.

⁵⁹ FERC's FEIS did not factor in the lost future impacts to shellfish beds suitable for cultivation that lie directly in the path of the Islander East proposed alignment. This "reserve" is of great importance to the State of Connecticut's Department of Agriculture, which is attempting to maximize the return of the commercial fishery to optimal conditions. Letter of David Carey, Director, Bureau of Aquaculture, Connecticut Dept. of Agriculture, to Susan Jacobson, October 2, 2003.

NMFS Memorandum (June 4, 2003) from Dr. W. Hogarth to B. Blum (NOAA) at 4.

Islander East contends that because “any conceivable pipeline route across Long Island Sound would have to pass through high quality waters, and would require the plowing of at least 8.9 miles of pipeline [in Connecticut waters],” there can be “no alternative, regardless of location, [that] could be deemed acceptable by CTDEP.” I.E. Supp. Bf. at 17. This assertion is unfounded. Among the criteria that the DEP provided in its July 29, 2003 objection (in addition to specifying an alternative to the project proposal) was to situate the pipeline in an area where it would “pass through areas of degraded water quality” where the adverse impacts associated with suspended sediment would deviate less from the applicable criteria. *See* discussion, Water Quality, *supra*. While the DEP acknowledges that most of the offshore areas of the Sound are typically classified as SA water, the pipeline could be located in an area where the water quality classification of nearshore water is lower, or where previous disturbance renders the location more suitable with all other factors in the balance. Those areas do exist; Islander East has not examined them.⁶⁰ Moreover, many of the adverse impacts identified by the agency in its objection as associated with plowing methodology were location-specific, that is, the plowing would have adverse affects in light of the proximity to shellfish beds and other resources which are concentrated within the Thimble Island complex. Therefore, Islander East’s assertion that “any conceivable route” using the plowing method would be deemed unacceptable by the DEP is, simply, wrong.

⁶⁰ *E.g.* New Haven Harbor, Saugatuck Harbor, Norwalk Harbor, Stamford Harbor, and Greenwich Harbor; and, to the east of the project’s currently proposed location: Guilford Harbor; the mouth of the Oyster River in Old Saybrook; the mouth of the Connecticut River (OL/OS), mouth of the Thames

Secondly, Islander East has insisted not only to the DEP but to the ACOE that the FERC NEPA documentation canvassed alternatives and its Order concluded that the company's preferred alternative best met its project objectives. The EPA and other federal resource management agencies agree, however, that there is another alternative that causes less environmental impact, like the ELI Extension. The FERC made comparison findings respecting ELI and Islander East's proposals by laying great emphasis upon the "policy goals" satisfied by a "second" pipeline. *See* FERC Order (January 17, 2003). In fact, any policy goal preference for a second pipeline could be adequately addressed by further inquiry into the role to be played by the "flexibility and reliability" to be afforded by other, existing gas pipeline infrastructure that has been built or been recently nearing completion on Long Island.⁶¹ The FERC was not disposed to reconsider the effect of any of these pipelines on its conclusion on the Islander East project.

The issue before the Secretary is not the same, and that is owing to the unique responsibilities cast upon the states by the independent CZMA review process. The coastal dependency of the project, and the preservation of existing, coastal dependent uses is not considered by the FERC in assessing the project's proposed objective. *See* 16 U.S.C. § 1452; FERC Order (January 17, 2003) at ¶ 118. By contrast, from a resource management perspective, the ACOE regards the FERC's articulation of the "project purpose" as too narrow for the purposes of permit review under the CWA Section 404. The ACOE has stated that "overall project purpose" for defining the "least environmentally damaging practicable alternative" ("LEDPA"; *see* App.) for a project that is non-water dependent, such as Islander East's proposed

River (NL). None of these locations was evaluated by Islander East from the standpoint of water quality criteria suitability.

project, is broader than NEPA review. ACOE Correspondence (May 21, 2003) at 3.⁶² A similar articulation of consistency with management program objectives underlies the CZMA no less. *See* 16 U.S.C. § 1452; *see also* 15 C.F.R. § 930.129(c).

In accordance with the Secretary's alternatives review standard, the alternative that the State of Connecticut has identified meets Islander East's primary objective, that is, to route additional natural gas supplies to Long Island. The total dekatherm delivery is smaller (175,000 Dth/d) than that proposed by Islander East, but the arithmetical difference is actually a secondary aspect of the alternative's loss/benefit calculus and is adequate

Islander East has insisted that any alternative configuration must be limited to a separate pipeline proposal, again, relying upon the FERC's analysis of public need and convenience. The acceptance of this precondition for the purposes of review under the CZMA and other environmental statutes is simply not legally required. As the Secretary has noted, weighing the national interest against adverse effects (costs) on coastal zone natural resources is not the focus of the alternatives inquiry: "An examination of site specific secondary purposes and/or all of the benefits, including site specific ones, that a project may obtain would likely make site alternatives for all projects unavailable." *Appeal of Yeomans Hall Club* at 6. The record demonstrates that: 1) there is no mandate anywhere that Islander East or any other project

⁶¹ Iroquois' Eastchester Extension is a case in point; Transco's pipeline into Long Island is another.

⁶² "[T]he project purpose used to conduct the analysis of alternatives pursuant to NEPA, analyzed by the Federal Energy Regulatory Commission (FERC) in the Draft and Final Environmental Impact Statements dated March 2002 and August 2002 respectively, appears too narrowly defined for a reasonable analysis of alternatives pursuant to the Guidelines. *The project purpose identified in the EIS documents and associated supporting documentation may preclude consideration of alternatives to the proposed pipeline alignment, which would have less impact on the aquatic ecosystem.*" ACOE Correspondence at 3 (emphasis added).

proponent must deliver at least 260,000 Dth/d; Iroquois' proposal to supply 175,000 Dth/d was not "insufficient" in this respect; 2) there are no data to demonstrate that the lesser supply could not ensure the project's success; 3) nor are there data to show from where, if necessary, the additional 85,000 Dth/d could or might be derived. *Cf., e.g., Sussler, supra*, at 5-6 (effect of options to reduce capacity commitments in Islander East's precedent agreements).

The remaining criterion, that of the reasonableness of the identified alternative, necessitates the weighing of additional costs associated with the implementation of the identified alternative against the environmental benefit of avoiding the impacts associated with the applicant's preferred alternative. Islander East has declined to provide any such costs analyses of alternatives that might include different routes. As to the value of saving the environmental resources of the Thimble Islands area, the hard currency value of saving the commercial shellfishery from disturbance or threat of future depredations is obvious. As itemized above, the nearshore impacts of the alternative alignment are eliminated; the total acreage of shellfish bed impact is reduced; and further reduction in the amount of available shellfishery resource is realized as a result of the alternative's commencing in deeper water. To the aggregate value of these savings, one adds the inestimable value of saving the Thimble Island complex from environmental loss.

Therefore, for all of the reasons stated above, Islander East has failed to demonstrate that it is legally entitled to an override of the DEP's coastal consistency certification objection under Ground

II. ISLANDER EAST’S PROPOSED PROJECT IS NOT NECESSARY IN THE INTEREST OF NATIONAL SECURITY

The second statutory ground (Ground II) under the CZMA for override of a state consistency objection to a proposed activity is a finding that the activity is “necessary in the interest of national security.” 16 U.S.C. § 1456(c)(3)(A),(B) and (d). In order to conclude that an override should obtain pursuant to this ground, the Secretary has to find that “a national defense or other national security interest would be *significantly impaired* if the activity were not to go forward *as proposed*.” 15 C.F.R. § 930.122 (emphasis added). The regulation also mandates that the Secretary accord weight to the views of the federal departments of defense and other constituent agencies of the government, although the Secretary is not bound by the positions of these agencies on the project in question. Most importantly, the Secretary is *not* bound by the general statements by such agencies relative to the question of national security; rather, he should consider only such *specific* information as these agencies provide. *Id.*; *see also Appeal of Amoco Production Co.* (July 20, 1990) at 56-58.

The Secretary’s regulations, 15 C.F.R. § 930.122, require that he review whether the national security of the United States would be significantly impaired were the activity not permitted to proceed “as proposed.” There must be a “specific link” established to exist between a particular project and a significant impairment of the national security if the project as proposed is not allowed to proceed. *Appeal of Mobil Exploration & Producing U.S., Inc.* at 46 n. 70.

There is no evidence on the instant record that the national security has been impaired or that the national defense has been implicated. Islander East’s assertions regarding the need for

energy independence and the “security” need for another pipeline to guarantee gas transmission to Long Island are in no way specific to the project “as proposed.”⁶³ More pertinently, Islander East’s claims are undercut by the source of the commodity that it proposes to transmit: it is foreign gas imported into the United States. The proposed project is a limited extension of established capacity via a system shunt to a currently serviced market area. It simply does not implicate national security or national defense. It has measurable impact upon the issue of national “reliance” and energy self-sufficiency.

Finally, in order to make the required finding under this second ground, the Secretary must have granted considerable weight to the views the Department of Defense and sister federal agencies. 15 C.F.R. § 930.122; *see also Appeal of Mobil Exploration & Producing U.S., Inc., supra*. They must file comments with the Secretary that identify national security objectives specifically and directly supported by the Islander East project, and, further, indicate which of the identified national defense or security interests of the United States would be “significantly impaired” if Islander East’s project were not be allowed to go forward as proposed by the company.

On April 29, 2003, Philip W. Grone, Under Secretary of Defense, in response to the solicitation of Mr. Scott Gudes, Deputy Under Secretary for Oceans and Atmosphere, Department of Commerce respecting the Islander East proposal, stated that “[w]e have reviewed the appeal and cannot conclude that a national defense or other national security interest would be significantly impaired if the project were not permitted to go forward as proposed.” *See*

⁶³ By way of contrast, in *Appeal of Mobil Exploration & Producing U.S., Inc.*, the Secretary had indeed remarked that use of *domestic* natural gas could reduce the nation’s reliance on the importation of

Attachments, Item No. 37. This commentary effectively ends the Secretary's inquiry under this ground. The Secretary has to date *not* relied upon national security grounds to override an objection to coastal consistency certification. The record in this appeal clearly provides no basis upon which to make such a finding.

CONCLUSION

For all of the foregoing reasons, Islander East's consistency appeal should be dismissed on the merits, because the proposed project is neither consistent with the objectives or purposes of the CZMA nor necessary in the interests of national security.

foreign oil and has overall positive impacts upon the national security. Decision of June 20, 1995 at 81.

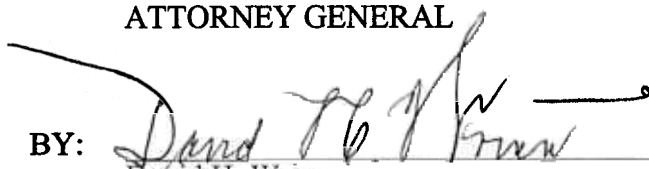
Dated at Hartford, Connecticut, this 4th day of October, 2003.

Respectfully submitted,

ARTHUR J. ROCQUE, JR.,
COMMISSIONER OF
ENVIRONMENTAL PROTECTION

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BY:



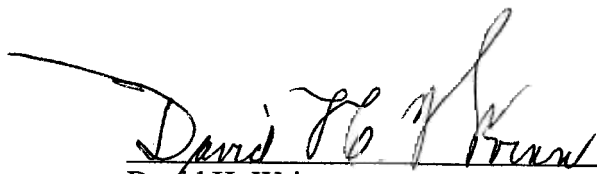
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CERTIFICATION

I hereby certify that a copy of the foregoing Opening Brief of the State of Connecticut was forwarded by overnight private delivery service, this 4th day of October, 2003 to:

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